UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURE DECISIONS

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ISSUED UNDER THE

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Room 1079 South Building

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Telephone (202) 447-4370

Direct all inquiries regarding this publication
to the address indicated above.

PREFATORY NOTE

The purpose of this official publication is to make available to the public, in an orderly and accessible form, decisions and orders issued by the Secretary of Agriculture, or those officers authorized by law to act in his stead, under laws administered by the Department of Agriculture.

The decisions published herein result from formal adjudicatory administrative proceedings instituted by the Department, under designated statutes and regulations, after notice and hearing or opportunity for a hearing. This publication does not include rules and regulations which are required to be published in the Federal Register.

Consent decisions entered subsequent to December 31, 1986 are not published herein. These Consent decisions are on file and may be inspected upon request to the Hearing Clerk, Office of Administrative Law Judges. However, a list of these decisions is published herein. (53 F.R. 6999, March 4, 1988)

The principal statutes concerned are the Agricultural Marketing Act of 1946 (7 U.S.C. 1621 *et seq.*), the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601 *et seq.*), Animal Quarantine and Related Laws (21 U.S.C. 111 *et seq.*), the Animal Welfare Act (7 U.S.C. 2131 *et seq*), the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*), the Grain Standards Act (7 U.S.C. 1821 *et seq.*), the Horse Protection Act (15 U.S.C. 1821 *et seq.*), the Packers and Stockyards Act, 1921, (7 U.S.C. 181 *et seq.*), the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499a *et seq.*), the Plant Quarantine Act (7 U.S.C. 151 et seq.), the Poultry Products Inspection Act (21 U.S.C. 451 et seq.), and the Virus-Serum-Toxin Act of 1913 (21 U.S.C. 151-158).

The decisions published herein are arranged alphabetically by statute and within the statute section by date of issue or date the decision became final after expiration of the appeal period. They may be cited by giving the volume number and page number, for illustration 1 A.D. 472 (1942). It is unnecessary to cite the docket or decision number. Prior to 1942 the Secretary's decisions were identified by docket and decision numbers, for example D-578; S. 1150. Such citation of a case in these volumes generally indicates that the decision is not published in Agriculture Decisions.

This publication also contains current court decisions of interest involving the regulatory laws administered by the Department.

LIST OF DECISIONS REPORTED

APRIL 1987

LIST OF DECISIONS REPORTED

PERISHABLE AGRICULTURAL COMMODITIES ACT

Disciplinary Decisions:

Reparation Decisions:

Reparation Default Orders:

LIST OF DECISIONS REPORTED

LIST OF DECISIONS REPORTED

CONSENT DECISIONS ISSUED

APRIL 1987

(Not published herein.—Editor)

Animal Quarantine

BYRD, I. E., d/b/a OAK LAKE CATTLE COMPANY and KERRY L. MCGEHEE, D.V.M. A.Q. Docket No. 310. As to I.E. Byrd d/b/a Oak Lake Cattle Company. 4/2/87.

SELLON, JERRY L., D.V.M. and AGRICULTURAL TECHNOLOGIES OF AMERICA, INC. A.Q. Docket No. 304. 4/24/87.

Animal Welfare Act

DELTA AIRLINES. AWA Docket No. 424. 4/29/87.

LAMBERT, WILLARD. AWA Docket No. 402. 4/29/87.

MECHTENSIMER, EARL. AWA Docket No. 417. 4/8/87.

Federal Meat Inspection Act

UTICA VEAL COMPANY, INC. FMIA Docket No. 95. 4/15/87.

Packers and Stockyards Act

BAUMERT, OSCAR J., JR. P&S Docket No. 6720. 4/13/87.

BLOOD, CALVIN A. P&S Docket No. 6819. 4/24/87.

EAST CENTRAL COLORADO PORK PRODUCERS ASSOCIATION and DOUG KISSEL. P&S Docket No. 6852. 4/24/87.

LOOMIS, LONNIE, d/b/a LOOMIS LIVESTOCK EXPRESS. P&S Docket No. 6850. 4/22/87.

MCTHAL, INC., d/b/a MCDOWELL MEAT PACKING and DONALD L. MCDOWELL. P&S Docket No. 6776. 4/30/87.

PREMIUM PACKING, INC., SHEILA M. OSTER, and ANTHONY FEIDER, JR. P&S Docket No. 6697. 4/6/87.

SOUTH ALABAMA CATTLE CO., INC., and W. M. BROWN P&S Docket No. 6686. 4/6/87.

TILTON, JOHN V. P&S Docket No. 6721. 4/16/87.

YOUNG, GUY. P&S Docket No. 6870. 4/27/87.

Plant Quarantine Act

LEWIS GROCER COMPANY, THE. P.Q. Docket No. 301. 4/13/87.

AGRICULTURAL MARKETING AGREEMENT ACT, 1937

LIST OF DECISIONS REPORTED

In re: CAL-ALMOND, INC.

AMA Docket No. F&V 981-2.

Decision and order filed April 13, 1987.

Petition does not comply with the rules of practice which require a full statement of the facts—Petition dismissed.

The Judicial Officer affirmed Judge Weber's order dismissing the complaint. The petition was filed under section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended, seeking to modify and exempt petitioner from the Marketing Order for Almonds Grown in California. However, the petition does not comply in form or content with the rules of practice, which require a full statement of the facts. Without a factual foundation spelled out in the pleadings, from which to create the issues, the ALJ would not be able to rule properly on evidentiary issues or control the development of the record.

John D. Griffith, for respondent.

Thomas E. Champagne, for petitioner

Initial decision by William J Weber, Administrative Law Judge

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a proceeding under § 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(15)(A)). It was instituted by a petition filed by Cal-Almond, Inc., seeking to modify and be exempted from the Marketing Order for Almonds Grown in California. On September 30, 1986, Administrative Law Judge William J. Weber (ALJ) dismissed the complaint. On November 3, 1986, petitioner appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 C.F.R. § 2.35).* The case was referred to the Judicial Officer for decision on December 8, 1986.

Based upon a careful consideration of the record, the ALJ's initial Order Granting Motion to Dismiss is adopted as the final Decision and Order in this case.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

The Petitioner has filed a Petition (and a First Amended Petition) seeking relief from various provisions of a Marketing Order controlling the marketing of almonds grown in California (7 CFR 981.1; "Order").

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* The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation, 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

Petitioner alleges that many provisions of the Order are void and illegal (i.e., not authorized by the Agricultural Marketing Agreement Act of 1937 (7 USC 601 *et seq.*, § 608c in particular), or violate anti-trust laws, or Equal Protection or Due Process provisions of the Constitution).

Petitioner also alleges that the many Order provisions are misinterpreted or misapplied to the detriment of Petitioner, in violation of Petitioner's rights.

Petitioner further alleges that the Order fails to effectuate the declared policy of the Agricultural Marketing Agreement Act of 1937, and therefore, the Order should be terminated by the Secretary of Agriculture because the Order is void and not in accordance with law.

Petitioner alleges that competition among almond handlers under the Order is unfairly and illegally affected.

The respondent filed Motion(s) to Dismiss the Petition, and then the first Amended Petition, on the grounds that the Petition(s) do not substantially comply in form or content with the Rules of Practice (in particular, 7 CFR 900.52(c)).

The parties filed extensive briefs in support of their respective contentions.

The Rules of Practice require, for this adversarial process, "[a] full statement of facts . . ."(7 CFR 900.52(b)(3)).

The respondent is then required to specifically admit or deny these allegations (7 CFR 900.52a(b)).

This is the foundation to identify and arrange factual and legal issues in order to determine relevancy and materiality of evidence to be received, or legal arguments to be framed. [1]

Nowhere, in either the original Petition, or the First Amended Petition, does Petitioner allege any specific factual events, incidents, decisions, transactions, or whatever, from which Petitioner's allegations of factual or legal error arise.

In lieu of pleading any factual basis for its various legal and factual complaints, Petitioner says:

> "The manner in which 'flow-to-market' restrictions have been instituted, removed, reinstituted, and re-removed by the Almond Board has given marketing advantages to C.A.G.E. (Cal-Almond's competitor), thus causing extreme disadvantage to Cal-Almond and other minority non-co-op handlers. Such will be fully demonstrated at a 15(A) hearing. In other words, at 15A hearing, Cal-Almond will demonstrate that the manner in which the Almond Board interprets and applies the

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[1] Evidence which is immaterial, irrelevant or unduly repetitions, or of an unreliable character, is not admissible. 7 CFR 900.60(d)

> Almond Order achieves CAGE's purpose rather than the purposes set forth within the congressional guidelines."

(Page 24, lines, 9-18, Cal-Almond's Memorandum in Opposition to Respondent's Motion to Dismiss the First Amended Petition, filed August 8, 1986). See also page 30, paragraph 1, of this same Memorandum.

Without a factual foundation spelled out in the pleadings, from which to create the issues, this proceeding would fall under the control of the Petitioner, who would be free to offer any evidence to "demonstrate" and support the sweeping allegations in the Petition.

The respondent would then need to recess to meet the evidence, and if appropriate, challenge it.

The process would necessarily be open-ended and beyond the control of the Judge who shares responsibility for the record with counsel.

In such a serious matter, to the parties, the industry, and the public, this cannot be permitted. The issues require sharp focus, clear definition and the best efforts of all participants to reach a proper result.

Petitioner's sincerity and strong convictions are obvious and recognized, but these cannot be allowed to overcome the serious defects in the Petition(s).

Petitioner relies on and extensively argues prior cases wherein similarly crafted petitions were not dismissed on motion. At this point, it is fair to say those proceedings are almost interminable. *In re Sequoia Orange Co., Inc.* AMA Docket No. F&V 910-7, Slip opinion filed November 8, 1985, *copy attached*. The costs to the participants go on for years on end, the volumes of paper grow, the focus and emphasis shift, and the misfeasance, malfeasance or nonfeasance (if there is any) continues without correction (if warranted by the evidence and law).

Petitioner sees itself as a victim of "catch-22", bouncing back and forth between the administrators, quasi-judicial administrative and judicial proceedings.

Most reluctantly, it must be said that this seems to be the result of Petitioner's unrefined approach to the issues and proceedings. Whatever legal or factual merits [2] may exist in Petitioner's views, they are submerged in sweeping opposition to the Marketing Order. The merits of Petitioner's position must emerge from a factually-rooted situation, specifically pleaded, to be considered in a 15(A) proceeding.

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[2] The need for and desirability of a Marketing Order is a decision not normally considered within the scope of a 15(A) proceeding. The legality of the provisions and their application in particular factual situations is the normal 15(A) subject matter.

Plaintiff fails to plead any facts. For this, and for the several reasons and grounds set forth in respondent's Motion(s) to Dismiss and the Memorandum filed in support of those Motion(s), the Petition should be dismissed.

Order

The Petition is dismissed.

APPENDIX

In re Sequoia Orange Co., Inc., 44 Agric. Dec. _____ (Nov. 8, 1985).

In re Airdrone Orchards, Inc., 44 Agric. Dec. _____ (Oct. 17, 1985).

In re: SAULSBURY ORCHARD AND ALMOND PROCESSING; CAL ALMOND, INC.; CARLSON FARMS.

AMA Docket No. F&V 981-4.

Decision and order filed April 1, 1987

Donald A. Tracy, for respondent.

Brian C. Leighton, Fresno, California, for petitioner.

Order by Donald A. Campbell, Judicial Officer.

ORDER DENYING INTERIM RELIEF

Petitioners' Application for Interim Relief is denied. *In re Borden, Inc.*, 44 Agric. Dec. ____ (Apr. 17, 1985); *In re Sequoia Orange Co.*, 43 Agric. Dec. ____ (Dec 18, 1984); *In re Dean Foods Co.*, 42 Agric. Dec 1048, 1048 (1983); *In re Moser Farm Dairy, Inc.*, 40 Agric. Dec. 1246, 1246-50 (1981).

ANIMAL WELFARE ACT

LIST OF DECISIONS REPORTED

In re: GREG GREEN

AWA Docket No. 308

Order filed April 8, 1987.

Order by William J. Weber, Administrative Law Judge.

ORDER DISMISSING COMPLAINT

Please be advised that the above captioned matter was assigned to me on April 6, 1987.

Complainant filed a complaint in August 1984, alleging that respondent had sold 18 dogs in January 1984 while unlicensed under the Animal Welfare Act (7 U.S.C. 2134; 9 C.F.R. 2.1). Complainant sought $18,000 in civil penalties and a cease and desist order.

Respondent denied the alleged violations.

Complainant now moves to dismiss the complaint on the groundsthat respondent has been prosecuted and convicted under state law for related state violations and that no further formal proceedings are necessary to effectuate the purposes of the Animal Welfare Act.

IT SHOULD BE AND HEREBY IS ORDERED that the complaint is dismissed without prejudice.

In re: BOBBY F. STEELE d/b/a BOB STEELE ANIMAL PROMOTIONS.

AWA Docket No. 323

Decision and order filed

Violation of requirements of the regulations to provide minimal risk of harm to the public and animals—Civil penalty—Suspension of license.

Respondent was a Class C lincensee under the Animal Welfare Act. While in the process of exhibiting an unmuzzled, uncaged cougar on a restraining leash, the cougar caused minor injuries to a child as the result of a collision with the child. Respondent ordered to cease and desist, license suspended for 30 days, and to pay a $1,000 civil penalty.

Donald A. Tracy, for Complainant.

Brian F. Eubanks, Bushnell, Florida, for Respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This cause arises by reason of a Complaint, filed October 9, 1984, by the Administrator, Animal and Plant Health Inspection Service, United

States Department of Agriculture, charging that the Respondent had violated the regulations and standards (9 C.F.R. 1.1 et seq.) issued pursuant to the Animal Welfare Act, as amended (7 U.S.C. 2131, et seq.). Attorney Richard M. Parsons, Washington, D.C., entered his appearance on behalf of the Respondent on October 31, 1984. Pursuant to an extension, an Answer was filed to the Complaint on November 19, 1984, and an oral hearing was requested at the same time. On June 5, 1985, Attorney Parsons withdrew as Attorney for the Respondent. On January 17, 1986, Attorney for the Complainant filed a motion to assign a date for oral hearing. The case was assigned to this Administrative Law Judge on February 25, 1986. On March 5, 1986, I scheduled the oral hearing for June 12, 1986, which on April 14, 1986, was changed to May 20, 1986, at which time the oral hearing took place in Orlando, Florida.

At the oral hearing, the Complainant was represented by Donald A. Tracy, Esquire, Office of the General Counsel, United States Department of Agriculture, and, the Respondent appeared pro se. Both the Complainant and the Respondent submitted proposed findings of fact, conclusions, order, and briefs. The Respondent submitted his through counsel· Brian F. Eubanks, Esquire, P.O. Box 128, Bushnell, Florida 33513. No reply brief was filed by the Complainant, and the case was referred for decision on November 5, 1986.

Findings Of Fact

1. Mr. Bobby F. Steele, hereinafter sometimes referred to as the Respondent, is an individual whose address is P.O. Box 1102, Leesburg, Florida 32748.

2. At all times material herein Respondent was licensed under the Animal Welfare Act as an Exhibitor with Class C License 58-EL-84.

3. On January 25, 1982, when Respondent applied to continue his license, he received a copy of the regulations and standards contained in Title 9, Chapter 1, Subchapter A of the Code of Federal Regulations and agreed in writing to comply with said regulations and standards.

4. On February 13, 1982, Respondent exhibited a cougar at an auto show at the David Lawrence Convention Center in Pittsburgh, Pennsylvania. The Pittsburgh Area Lincoln Mercury Dealer Association hired Respondent to exhibit his cougar.

5. On February 13, 1982, the Respondent, an experienced animal trainer, was in the process of entering the said convention center with the unmuzzled, uncaged cougar, known as Tom-Tom, and he was preceded by the two security guards whose function and purpose was to keep the public from the path to be taken by Respondent and the cougar until they got to the roped-off area where the cougar was to have been on display.

6. The cougar was on a strong restraining leash, it had been declawed, and had its canine teeth filed down to make them dull.

7. The Respondent was requested to show his cougar at a time earlier than usual to preclude the public from requesting refunds.

8. As the Respondent was approaching the preformance area, at approximately 3:30, in the afternoon, while in an uncrowded area, a child darted out and collided with the cougar.

9. The nine-year old child received minor injuries as the immediate result of the collision but suffered more serious injuries when an assistant deputy sheriff intervened and shot the cougar before the Respondent, who had his hand in the cougar's mouth, was able to extricate the child from the cougar.

10. Under the circumstances of this case, the Respondent's precautions to protect the public and the animal were insufficient and a violation of 9 C.F.R. sec. 3.135 (c) requiring that during public display, animals must be handled so there is minimal risk of harm to the public, and, 9 C.F.R. sec. 3.135 (a) and (b), in that failure to handle the cougar properly led to its death.

Conclusions

The issue herein is whether, by bringing the cougar into the convention center, from an uncrowded area, and one where the public would ordinarily not be expected, in the middle of the day, while the center was crowded, the Respondent violated the requirements of 9 C.F.R. 3.135 (c) to provide minimal risk of harm to the public, and to the animal

Both parties agree that there is an absence of a standard in the regulation requiring specified, designated actions to be taken to achieve minimal risk to the public and to the animal Certainly, there is no express requirement that the animal had to be caged. Perception of the nature and demands of the event after it has happened, indicate that a cage, under the circumstances of this case probably would have precluded the accident. It is of importance to note that we are not concerned with a time that the cougar was on display, but, rather, with that period when the cougar was brought from its trailer and was on its way to where it was to be displayed. That particular area was not crowded.

As set forth on brief, and in the Findings of Fact, supra, the animal had been displayed before, without being caged; its teeth had been filed down to make them dull; it had been declawed; the area where the incident occurred was a storage area where the public is not ordinarily expected; and, from the evidence presented, and which was not controverted, the child was running around unsupervised in an area of the convention center not being used by the general public. In addition there was an intervening party: the off duty policeman who shot the cougar, causing it to bite the child in its death gasp.

This is not a circumstance of assessing blame for the injury to the child---[1] there were too many factors entering into the incident, and there is a lack of evidence as to the relationship of each to the others: There was the Lincoln-Mercury Dealer Association that contracted to have a cougar displayed in a crowded convention center in order to draw people to the exhibits; the request that the cougar be displayed earlier than planned to preclude the public asking for refunds; there were the two guards whose purpose it was to keep the public away from the animal; there was the policeman who shot the cougar, before the Respondent could extricate the child from the cougar; there was an unsupervised child in an area where he ordinarily would not have been expected; there is a past history of displaying the cougar, without a cage, under circumstances similar to this, and, without incident; and there is no requirement in the regulation that the animal had to be brought to the display area in a cage.

The evidence herein does not support any theory of callousness on the part of the Respondent.

A child was hurt. The sanction herein is premised, somewhat, on the like theory of *Res Ipsa Loquitur*, and, the premise that the Respondent was, in essence, the guarantor of the safety of the public, from a potentially dangerous animal. Only he knew the animal's temperament and potential. Thus, under the circumstances, he had to exercise the highest degree of care and diligence, which in this case, could have been accomplished by a cage for the cougar in order to provide minimal risk of harm to the public and to the animal.

The testimony of Mr. Eppele and Mr. Swartz, witnesses for the Complainant, has been accorded much consideration. However, Mr. Eppele was not present at the time of the accident, and derived his information from interviews and other sources (Tr. 23). Also, he acknowledged that he had had no experience with wild animals. The fact that a child was injured, takes on significance in this proceeding, and accordingly, Mr. Eppele's testimony that a child was injured was of no significance, with respect to an *ex post facto* interpretation that as to this Respondent, a caging of the animal was required, (Tr. 27), is not adopted as the criteria to be applied.

Mr. Swartz's testimony indicated that the cougar was not maintained in a safe way for exhibit purposes. He indicated that it "appears" that the Respondent was not handling the animal so as to provide minimal risk to the public and that the Respondent "could" have contained the animal in a cage.

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(1) Complainant agrees that the issues of this case do not encompass "• • • exactly who was to blame or who was responsible for the injury to the child • • •" (Tr. 6).

Both of the Complainant's witnesses had never conducted investigations involving circumstances similar to those of this case. Both witnesses lacked sufficient knowledge of wild animals, in general, and cougars, in particular, to give worthy opinions as to the adequacy of Respondent's precautions. As set forth above, since a child was injured, obviously, the precautions were not adequate.

With respect to that part of the Complainant's requested sanction relating to the compulsory caging of Respondent's "big cats", it is of moment to note that there has been no showing, other than the general testimony of the above-mentioned witnesses, that a cage precludes accidents, such as a child placing his hand in a cage, or, otherwise coming into contact therewith, and/or the caged animal. Also, the record does not support the circumstances under which a cage would be required, and whether it would be equally applicable to a 20 pound cougar kitten or a 400 pound adult tiger.

The regulation applicable herein was designed to prevent a certain type of dangerous situation, and, indeed, must be rigorously applied. However, the requested sanction of the Complainant that Respondent, through ad hoc rule making be bound by an unwritten, and, vague requirement, not applicable to all exhibitors, does not partake of concrete and focused rule making so as to make formulation of alternatives, or comment, possible. This is not to say that under certain circumstances, Respondent, as well as all other exhibitors, should not cage their animals. *They should* if minimal risk to the public requires it.

Also, with respect to the requested sanction, there are mitigating factors such as the testimony of the Respondent, who was a credible witness, that no prior accidents had happened in the 17 years of his experience (Tr. 54) and, that the cougar had not in the past displayed aggressive tendencies, even in crowds (Tr. 58,59). Also, the requested sanction is based upon an *ex post facto* interpretation. In addition, Exhibits 6 and 7, none of which was persuasively controverted by the Complainant, indicate that personnel of APHIS were aware of, and, made no objection to the manner in which the Respondent handled the cougar. For instance, Exhibit 6, reflecting an inspection of approximately two years later, states in part:

> "Mr. Steele told me how he complied with Para. 3 140-Handling during public display and the necessary employees present during the displaying of the cougars."

In addition, Mr. Steele testified that:

> "At no time in any of the six inspections by their own people has one solitary person ever told me that I was doing wrong at Pittsburgh, to cease and desist, * * *".

The determination of sanction is a matter reposed in the discretion of the Judicial Officer. However, after considering the record as a whole,

and all the contentions of the parties, I believe that the sanction set forth in the Order, below, is a just and correct disposition of this matter and, one which takes into consideration the safety of the public and that of the animals.

Order

1. The Respondent, Bobby F. Steele, is ordered to cease and desist from violating the Animal Welfare Act and the regulations and standards thereunder.

2. The Respondent, Bobby F. Steele, is assessed a penalty of One Thousand Dollars ($1000.) payable by certified check or money order to the Treasurer of the United States and forwarded to Donald A. Tracy, Esquire, United States Department of Agriculture, Office of the General Counsel, Room 2014-South Building, Washington, D.C. 20250.

3. The Respondent's license under the Animal Welfare Act is suspended for Thirty (30) days.

All contentions, requests, motions, and otherwise of the parties have been considered, and, to the extent not ruled upon, they are denied.

This Decision and Order shall become final and effective 35 days after service thereof, unless appealed to the Judicial Officer within 30 days, as provided by the Rules of Practice and Procedure.

Copies hereof shall be served upon the parties.

[This decision and order became final March 24, 1987.—Editor.]

FEDERAL MEAT INSPECTION ACT

LIST OF DECISIONS REPORTED

In re : APEX MEAT COMPANY, INC.

FMIA Docket No. 78

Order filed April 15, 1987.

Harold Reuben and Joseph Pembroke, for Complainant.

Philip Olsson, Washington, D.C., for Respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER CONTINUING STAY ORDER

On March 27 and April 13, 1987, respondent filed reports stating that Mr. Magidow's association with respondent will be ended by April 20, 1987. Accordingly it appears that the initial condition of the order filed January 28, 1987, will be met, and that the stay order previously filed should remain in effect until further order of the Judicial Officer.

Respondent's report contains proposals as to complying with the sale of Mr. Magidow's stock and continued plans for disassociation from Apex which raise serious questions as to whether the proposals would, in fact, meet the requirements of the order filed January 28, 1987. For example, respondent's report states that Mr. Magidow might find it necessary to finance the acquisition of respondent by a third party or sell the business and lease the facility to the buyer of the business. The report states that Mr. Magidow will continue to be a broker and dealer in meat and meat food products, and that respondent' s attorneys have "advised Mr. Magidow that he may engage in that business with any and all entities including those who purchase the inspected business of Apex" (Report at 3). In other words, respondent might sell the business to a third party who is dependent upon Mr. Magidow's financing, and Mr. Magidow could be the sole "selling arm" of the new firm, i.e., Mr. Magidow might buy all (or a significant part) of the output of the new firm, and then resell it to others. Such an arrangement would not likely be approved.

There is no need for respondent to file any further reports until near the end of the 1-year period provided for in the order filed January 28, 1987. In the mean time, respondent should continue to keep complainant advised of Mr. Magidow' s plans, and continue to advise in a timely manner as to whether Mr.Magidow's proposals are acceptable to complainant. (Any proposal agreed to by complainant will quite likely be routinely approved by the Judicial Officer.) Assuming that complainant promptly considers and responds to respondent's proposals, indicating approval or specifying the precise features of a proposal that are unacceptable, it is not likely that the Judicial Officer will grant any extension beyond the 1-year period specified for disassociation in the original order filed January 28, 1987.

If complainant does not approve of a proposal that respondent believes is acceptable, respondent may bring the matter to the attention of

the Judicial Officer for resolution. However, every effort should first be made by the parties to resolve the matter.

Order

The stay order previously issued in this proceeding shall remain in effect until further order of the Judicial Officer.

PACKERS AND STOCKYARDS ACT

LIST OF DECISIONS REPORTED

Disciplinary Decisions:

PACKERS AND STOCKYARDS ACT

DISCIPLINARY DECISIONS

In re: ROTCHES PORK PACKERS, INC., AND DAVID A. ROTCHES.

P. & S. Docket No. 6458

Decision and order filed April 13, 1987.

Packer—Failure to pay and failure to pay when due for meat—Civil penalty.

Summary: The Judicial Officer affirmed Judge McGrail's decision assessing a $50,000 civil penalty against the individual respondent and ordering both respondents to cease and desist from failing to pay, and failing to pay when due, for meat and meat food products purchased. The corporate veil is pierced to impose a sanction on the responsible individual, who owned 100% of the stock of respondent corporation and was responsible for its day-to-day operation. Complainant need only prevail by a preponderence of the evidence. Complainant was under no obligation to explore affirmative defenses available to respondents. Although respondents contend that they failed to pay for meat products because they had been cheated by the supplier, respondents failed to prove that such cheating occurred. The evidence shows that the individual respondent agreed with his bank that payment on checks to the supplier should be stopped, but even if the bank had unilaterally decided to stop payment, that would have not excused respondents' failure to pay for the meat products. Complainant originally recommended a $210,000 civil penalty, based on 10% of the amount estimated to be due to the supplier, but that was properly reduced by the ALJ in view of mitigating circumstances. Severe sanction policy explained.

Allan R. Kahan, for Complainant.

Leonard B. Austin, Garden City, New York, for Respondent.

Initial decision and order by *Edward H. McGrail, Administrative Law Judge.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*).* An initial Decision and Order was filed on August 8, 1986, by Administrative Law Judge Edward H. McGrail (ALJ) assessing a $50,000 civil penalty against the individual respondent and ordering respondents to cease and desist from failing to pay, and failing to pay when due, for meat and meat food products purchased.

On September 16, 1986, respondents appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 C.F.R.

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* *See generally* Campbell, *The Packers and Stockyards Act Regulatory Program*, in 1 Davidson, Agricultural Law, ch. 3 (1981 and 1986 Cum. Supp.), and Carter, *Packers and Stockyards Act*, in 10 Harl, Agricultural Law, ch. 71 (1980).

§ 2.35).** The case was referred to the Judicial Officer for decision on October 10, 1986.

Oral argument before the Judicial Officer, which is discretionary (7 C.F.R. § 1.145(d)), was requested by respondent, but is denied inasmuch as the issues are not novel or difficult, the case has been thoroughly briefed, and oral argument would seem to serve no useful purpose.

Based upon a careful consideration of the record, the initial Decision and Order is adopted as the final Decision and Order in this case (with a few trivial changes), except that the effective date of the order is changed in view of respondents' appeal, and specific provisions are added as to the manner in which the civil penalty shall be paid. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

This is a disciplinary proceeding under Title II of the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), hereinafter referred to as the Act, instituted by a Complaint and Notice of Hearing filed on December 3, 1984, by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture.

The Complaint alleges that respondent Rotches Pork Packers, Inc., under the management, direction and control of respondent David A. Rotches, in connection with the operations of Rotches Pork Packers, Inc., as a packer subject to the Act, purchased meat and meat food products and failed to pay for said meat and meat food products. Said practices are alleged to be in willful violation of section 202(a) of the Act (7 U.S.C. § 192(a)).

On December 31, 1984, respondents filed a "pro se" answer to the Complaint in the form of an "affidavit" which had been provided to the investigators of the Packers and Stockyards Administration during the course of the investigation. The affidavit essentially admits failure to pay for shipments alleged in the Complaint but avers such amounts were not paid because of late-found practices of the seller which were believed to offset payments due, i.e., double billing; shortage of the number of hogs shipped; excessive trimming; and poor quality of

** The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program) (December 1962-January 1971).

dressed hogs shipped to respondent. The record did not reflect a formal appearance by an attorney on behalf of respondent.

The oral hearing commenced on February 19, 1986, in New York City, New York, before the [ALJ]. On the initial date of the scheduled hearing, February 19, 1986, Ms. Kathy Rosenthal, Esq., made a formal appearance on behalf of respondents for the purpose of entering a Motion for Continuance on the basis that attorneys were only recently engaged by respondents. The motion was denied at the hearing since this matter had been set for oral hearing by Notice of Hearing issued on January 7, 1986, and ample time was given to allow for respondents to retain counsel. Moreover, during the course of exchanges for possible settlement, respondents were urged, because of the serious nature of the allegations, to retain counsel. The respondents did not do so until a day or two before the hearing. Continuance was granted, however, until February 20, 1986, when respondents were represented by Leonard B. Austin, Esq., of Stillman, Herz and Austin, Garden City, New York. Complainant was represented by Allan R. Kahan, Esq., Office of the General Counsel, United States Department of Agriculture. Complainant called three witnesses and offered three exhibits. Respondents called one witness and offered five exhibits. Alternate briefs were ordered to be submitted by the parties, complainant's counsel on April 25, 1986, and respondents' on May 27, 1986. However, time for respondent's brief was eventually extended to July 7, 1986. Such briefs have been duly considered herein.

Findings of Fact

1. Rotches Pork Packers, Inc., hereinafter referred to as the corporate respondent, is a corporation organized and operating in the State of New York. Its business mailing address is 5600 First Avenue B-6, Brooklyn, New York 11200. (Respondent's Answer)

2. The corporate respondent was, at all times material herein:

(a) Engaged in the business of purchasing livestock for slaughter;

(b) Engaged in the business of manufacturing or preparing meats or meat food products for sale or shipment in commerce; and

(c) A packer within the meaning of the Act and subject to the provisions of the Act.

3. David A. Rotches, hereinafter referred to as the individual respondent, is a individual whose mailing address is 243 Lafayette Street, Williston Park, New York 11596 (Respondent's Answer)

4. The individual respondent is, and at all times material herein was:

(a) President and owner of 100% of the stock of respondent Rotches Pork Packers, Inc. (Respondent's Answer)

(b) Responsible for and exercised the management, direction and control of the practices and activities of respondent Rotches Pork

Packers, Inc. (Respondent's Answer; Tr. 139) [1]

5. The individual respondent was, at all times material herein, a packer within the meaning of the Act and subject to the provisions of the Act.

6. Rotches has operated as a cutter and seller of dressed hogs, selling to wholesalers, since 1967. In September 1980, it entered into an agreement with Arbogast and Bastian, Inc. (A&B) whereby payments for purchases of dressed hogs by Rotches from A&B would be held in abeyance until 7 to 10 days after purchase. In late 1982, in order to increase A&B's sales to Rotches, the period of payment for Rotches was extended to 14 days for any amount of dressed hogs purchased from A&B. Initially, this amounted to $600,000-$700,000. (TR. 136-138, 146)

7. In April 1983, at the request of A&B, Rotches obtained additional financing, in the form of a line of credit, from Bankers Trust Company, New York, New York. In order for Rotches to obtain this financing A&B entered into an agreement with Bankers Trust Company subrogating its claims to assets of Rotches, including accounts receivable, in favor of Bankers Trust Company. As of May 31, 1983, Rotches' accounts receivable were collected and turned over to Bankers Trust Company in accordance with this agreement. (Resp. Ans., p. 4; Appendix - "Inter-Creditor Agreement," dated April 28, 1983) The original line of credit was for $1.0 million but was later increased to $2.5-$3.0 million. (Tr. 140-142). Since A&B took this subrogated position in order to afford additional financing for Rotches, the individual respondent gave a personal guarantee to A&B, in the form of a mortgage on his home, on May 5, 1983. (RX-4; Tr. 156).

8. In March 1984, the individual respondent agreed with A&B to oversee A&B's plant operations at Allentown, Pennsylvania, in order to raise the daily hog kill to plant capacity. (Tr. 139-140) While serving in this capacity, respondent discovered that on several occasions shipments of dressed hogs sent by A&B to respondents' Brooklyn, New York, facility were short-weighed or short-counted. On two loads of hogs shipped by A&B in late April 1984, the individual respondent determined that he had been short-weighed a total of 2,647 pounds. On other occasions inferior hogs were shipped. Due to abnormalities in these inferior hogs, the processing by A&B resulted in an average 17% miscut, i.e., part of the hog had to be removed to pass USDA inspection. (Resp. Ans., p. 5; Tr. 146-148, 152). Additionally, the individual respondent determined that, on one occasion, A&B billed him for the price of hogs Rotches had purchased directly from Gibson & Sons

[1] Reference to exhibits are designated "CX" and "RX" to indicate those submitted by complainant and respondent, respectively. References to the hearing transcript are designated "Tr.".

(G&S), an Indiana hog supplier. This amounted to approximately $43,000. Rotches purchased live top-rate hogs directly from G&S from 1983 until Rotches closed on April 25, 1984. Such hogs were delivered by G&S to the A&B Allentown plant for slaughter and processing. Rotches paid G&S directly for these hogs because G&S had complained that A&B was paying as much as 12 days late. Charges by A&B to Rotches were only to be for processing and shipment of the dressed hogs to Brooklyn. A&B not only billed Rotches for these charges but also the purchase price of the same hogs which had already been paid by Rotches. (Resp. Ans., p. 5; Tr. 84, 136, 150-152) No money is owed G&S by respondents for the purchase of live hogs.

9. In late April 1984, the individual respondent confronted officials of A&B with these irregularities and advised them that because of these irregularities he estimated that A&B owed Rotches between $1.3-$2.0 million. The individual respondent advised further that he would immediately commence taking credit set-offs from the amounts Rotches owed A&B for its purchases. He was advised that if he did so A&B's creditor would close down the plant. The record does not show any specific basis upon which the individual respondent relied on in reaching this total amount of set-off against A&B. (Tr. 153).

10. Following this advisory by A&B, the individual respondent notified Bankers Trust Company who then took over control of Rotches' assets and advised the individual respondent to stop payment on all checks issued to A&B in late April and early May 1984. This action was based on the agreement between respondents, A&B and Bankers Trust Company. (Tr. 157-158, 182-183) A&B filed a petition under Chapter 11 of the Bankruptcy Act in the United States Bankruptcy Court for the Eastern District of Pennsylvania on or about May 11, 1984. (RX-4; Tr. 152-154)

11. The individual respondent has estimated that for the period February through April 1984, meat purchased from A&B, sold by Rotches to wholesalers, and returned later to Rotches for credit because of spoilage, amounted to $400,000-$500,000. This meat was shipped by A&B at a time when it was having refrigeration problems. The individual respondent only became aware of such spoilage when the meat was later returned by customers. There is no documentary evidence of record upon which to base this amount of set-off against A&B. However, such claims for this spoilage are in the possession of Bankers Trust Company. (Tr. 160-163)

12. Purity Bacon Company, Allentown, Pennsylvania, is a company owned by A&B. Purchases by this company from Rotches in the amount of $179,000 are still unpaid. It had been orally agreed between A&B and respondent that Rotches could set-off this amount against monies owed by Rotches to A&B. (Tr. 160)

13. The corporate respondent, under the management, direction and control of the individual respondent during the period from on or about April 11, 1984, through May 17, 1984, on 18 days and in 116 transactions during that period, purchased meat and meat food products from Arbogast & Bastian, Allentown, Pennsylvania, a packer. During this period, twenty-two checks, amounting to $908,022.88, were issued by Rotches in payment of 39 invoices involved in these transactions. However, on twenty of these checks amounting to $818,822.57, stop payment orders were issued. Thus, as of June 26, 1984, it was estimated that unpaid amounts to A&B for by-products and carcasses amounted to $2,183,437.11. Respondents' business was closed on April 25, 1984. At the present time, the individual respondent occasionally acts as a consultant to other packers for which he receives a salary of $449 per week. He has no other income. (CX-1; Tr. 136, 180-182).

14. The Answer filed by respondents on June 15, 1984, in response to A&B's complaint filed in the United States Bankruptcy Court for the Eastern District of Pennsylvania, Chapter 11, No. 84-01538T, avers as an affirmative defense against A&B's claims of non-payment - that it was in possession of claims against A&B for fraud, defalcation and credits due which totalled between $1 million and $2 million, and that any amount found to be due A&B from Rotches is off-set by a greater amount due Rotches from A&B. (RX-2, 3). No such documents reflecting these claims were presented for this record.

15. A temporary restraining order was issued on May 18, 1984, by the Bankruptcy Court against respondents and Bankers Trust Company enjoining them from diverting Rotches' proceeds received from sales of products derived from slaughtered livestock to any of Rotches other creditors until payment was made to A&B. (RX-1) Bankers Trust Company advised that in the event respondents' accounts receivable were found by the Bankruptcy Court to be trust assets, it would turn collected funds over to the court-appointed trustees. (Resp. Ans., p. 4)

16. The investigation in this matter was initiated by the Packers and Stockyards Administration, U.S. Department of Agriculture (P&S) on May 24, 1984, approximately two weeks after A&B filed in Bankruptcy. In cooperation with P&S's investigators, respondents provided all of the records which were available. Individual copies of unpaid invoices reflecting respondents' purchases from A&B, for the period April 11, 1984, through May 17, 1984, were obtained and received into the record, together with a tabulation of these invoices. (CX-1, 2; RX-4; Tr. 59-60, 69-72, 103) Although some of the individual invoices were stamped "Paid" by respondents and checks issued, payment was stopped on these checks, thus, leaving unpaid the amounts reflected on these checks. For example, A&B invoice nos. 019384 and

019408 are stamped "Paid" by respondents' check no. 7057, dated April 27, 1984. (CX-2, pp. 1-2) However, payment was stopped on this check on May 2, 1984. (CX-1, p. 1, lines 1-2, col. 11; Tr. 73) The data concerning these checks and the stop payment dates were obtained from a letter in respondents' records which was sent to A&B on May 2, 1984. (Tr. 94)

17. During the course of the investigation respondents advised investigators on several occasions that there were credits and adjustments to be made with respect to the outstanding amount due to A&B. Respondents produced some records showing credits, and also advised of credits due from A&B for off-conditioned meat, mistagged meat, and missing product. On several occasions, the individual respondent was given opportunity to produce records showing credits granted by A&B. Such were not produced. Thus, readjustments for credits from the amount due were only given where they could be substantiated by documentation produced from respondents' records. (Tr. 74, 80, 83, 94, 96-100, 103; CX-1, p. 3, lines 32-35, col. 7, CX-3) The records of A&B were not checked to determine whether Rotches' unpaid invoices to A&B included amounts already paid by Rotches to G&S. (CX-3; Tr. 102) Nor were individual invoices obtained from respondents' records checked against the corresponding invoices in the records of A&B to determine whether credit had been given. (Tr. 106) Although the Bankers Trust Company agreement with A&B was submitted as part of respondents' Answer, Bankers Trust Company was not contacted for documents relevant to credits due from A&B. (Tr. 77-87, 104)

Discussion and Conclusions

The Complaint in this matter alleges that respondents failed to pay for meat purchased from A&B in violation of section 202(a) of the Act (7 U.S.C. § 192(a)). Section 202(a) provides:

> It shall be unlawful with respect to livestock, meats, meat food products, livestock products in unmanufactured form, poultry, or poultry products for any packer or any live poultry dealer or handler to:
>
> (a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device;

Failure to pay, when due, for purchases of livestock has long been held to be an unfair and deceptive practice in violation of Section 202(a) of the Act. *In re Mid-West Veal Distributors*, 43 A.D. ____ (July 13, 1984) (and cases cited therein). Likewise, failure to pay the contract price for purchases of meat, and meat products has also been held to be an unfair and deceptive practice in violation of this section of the Act. *In re George Ash*, 22 A.D. 889 (1963); *In re Goldring Packing Co.*, 21 A.D. 26 (1962); *In re Eastern Meats, Inc.*, 21 A.D.

134 (1962). The former is not involved here since the record discloses that although respondents purchased live hogs from Gibson & Sons of Indiana, payments were made promptly and no money is due or owing for these purchases. Therefore, a statutory trust as required by Section 206(b) of the Act, 7 U.S.C. § 196(b), is not involved here. Thus, it is with the latter that we are here concerned, i.e., failure to pay for meats and meat products purchased from A&B by respondents.

The record is clear that until the time the individual respondent discovered irregularities in his dealings and purchases from A&B, A&B was paid in accordance with their oral agreement, i.e., within 14 days of invoice date. There is no evidence of record to show lack of funds to pay on the part of respondents, or that respondents had previously stopped payment on checks issued to A&B. It is also clear that failure to pay on the part of respondents commenced when the individual respondent discerned what he considered to be fraudulent practices on the part of A&B in that he was short-weighed, short-counted, received inferior product, was shipped spoiled meat, and was double billed by A&B for purchases from G&S. It was the individual respondent's assessment that he should not pay A&B any further amounts since it was his estimate that a near equal amount was owed him because of the irregularities he had discovered. Further, that if A&B closed down its plant these amounts would not be recoverable. This judgment was concurred in by Bankers Trust Company, the party to whom A&B, by agreement, had subrogated its rights to Rotches' assets and accounts receivable. Although it is found that the individual respondent was credible and forthright in portraying his trials and tribulations in dealing with A&B, the burden of coming forward with proof of such set-offs rested upon respondents. On three different occasions investigators provided him opportunity to come forward with valid documentation of such set-offs, other than double billing by A&B, but he failed to do so. This may well have been due to the short period of time which elapsed between discovery of the irregularities by respondents, A&B's filing in bankruptcy, and the commencement of the investigation into his matter.

Respondent avers that the total amount due from A&B for the irregularities alleged ranged between $1.3–2.0 million. This amount was also stated in respondents' Answer to the Complaint filed in the Bankruptcy Court in Pennsylvania. The Answer also averred that it was in possession of documentation to prove the off-sets claimed. However, no such documentation was presented for the record here. Of this amount, $400,000–$500,000 was estimated by the individual respondent as the dollar amount of spoiled meat returned by customers. Claims for credit for the spoiled meats were turned over to the Bankers Trust Company. No documents were provided for the record to show

such claims, nor was Bankers Trust Company contacted to verify these claims.

Other amounts were designated by the individual respondent as double billing. For example, respondents' Answer cites double billing on shipments for a day or two in late April 1984, which amounted to $43,000. Additionally, investigators noted, concerning an invoice dated April 20, 1984, in the amount of $72,502.21, that this amount of set-off was, "As per Rotches' records this was double billing by A&B." However, although accepting this amount as being shown in respondents' records, it does not appear that respondents were given credit for this amount in determining the total amount due and owing to A&B. (CX-1, pg. 2, lines 1-5)

Still other amounts claimed by respondents on invoices dated on and between April 13, 1986, and May 4, 1986, amounting to a total of $128,796.67, were not allowed by investigators because "These credits have not been approved by Arbogast & Bastian, Inc. They arrived from Rotches' claims for over billing, duplicate billing and shortages." (CX-3) A&B's records were not checked to ascertain whether this amount was indeed approved as a set-off. It is noted here that these invoices are dated during a period, late April and early May 1984, when the individual respondent determined two loads of carcasses received on the same date were short-weighed a total of 2,647 pounds. (Tr. 152) Finally, it does not appear that any set-off credit was allowed for $179,000 owed to respondents by a subsidiary of A&B, Purity Bacon Company. The individual respondent asserted that there was oral agreement between A&B and respondents to set-off this amount from amounts owed to A&B.

Nevertheless, in considering the entire record it must be found that respondents failed to pay for meats purchased from A&B in violation of Section 202(a) of the Act. (7 U.S.C. § 192(a)). As noted previously, the business of Rotches Pork Packers, Inc., has been discontinued. However, as has been found, the individual respondent owned 100% of the stock of respondent and was responsible for the day-to-day operation, management and control of the practices and activities of respondent company. Under such circumstances, the corporate veil has been pierced to impose a sanction on the responsible individual respondent. *In re Trenton Livestock, Inc.*, 41 A.D. 1965, 1971-1980 (1982); *In re Pastures, Inc.*, 39 A.D. 395, 397-401 (1980); *In re Norwich Veal and Beef, Inc.*, 37 A.D. 1202, 1205 (1978); *Livestock Marketers v. United States*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978; *Bruhn's Freezer Meats v. United States Department of Agriculture*, 438 F.2d 1332 (8th Cir. 1971). Thus, the individual respondent here is held responsible for failure to pay for meats purchased from A&B.

Sanction

The civil penalty sought here by Complainant, $210,000, is based on 10% of the amount estimated to be due and owing by respondents to A&B. This policy of determining the amount of a civil penalty was formulated approximately six months prior to the commencement of the oral hearing. It is recognized that severe civil penalties have long been imposed in numerous cases as a deterrent to future violations not only by respondents but also by other potential violators. *In re Worsley*, 33 A.D. 1547, 1556-1571 (1974); *In re Collier*, 38 A.D. 957, 971-972 (1979), *aff'd per curiam*, 624 F.2d 190 (9th Cir. 1980) (unpublished); *In re Mid-States Livestock, Inc.*, 37 A.D. 547, 549-51 (1977), *aff'd sub nom. Van Wyk* v. *Bergland*, 570 F.2d 701 (8th Cir. 1978).

However, because of mitigating circumstances here, I find the civil penalty sought to be too severe. Although it has been found that respondents violated Section 202(a) of the Act (7 U.S.C. § 192(a)), nevertheless, the circumstances under which stop-payment of checks was ordered, and later failures to pay, are such that a lesser civil penalty will meet the purpose of imposing civil penalties, i.e., to serve as a deterrent to future violations by respondents as well as other potential violators. A penalty of $50,000 is therefore imposed.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondents contend on appeal that complainant failed to prove that respondents violated the Act. However, the proof here is far beyond the required preponderance of the evidence. [2] Respondents particularly contend that complainant failed to meet its burden of proof because it did not review and present the records of A&B. In fact, respondents contend that that failure violates respondents' due process rights. However, as correctly held by the ALJ, respondents had ample opportunity to subpoena A&B's records, and to present any available defense based on A&B's records. Complainant was under no obligation to explore affirmative defenses available to respondents.

Respondents contend that insufficient consideration was given by complainant and the ALJ to the "INTER-CREDITOR AGREEMENT" dated April 28, 1983 (attached to respondents' answer), signed by A&B's president and respondents' bank, Bankers Trust Company. However, that agreement is of no consequence here. The agreement provides that the interest of Bankers Trust Company shall be "prior and superior" to the interest of A&B with respect to the assets of

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[2] *See Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman* v. *SEC*, 450 U.S. 91, 92-104 (1981); *In re Rowland*, 40 Agric. Dec. 1934, 1941 n.5 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1346 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980).

Rotches Pork Packers, Inc. But that agreement in no way excuses a failure to pay for meat or meat products by respondents.

The "INTER-CREDITOR AGREEMENT" does not give Bankers Trust Company the right to make business decisions for respondents or to determine which of respondents' creditors shall be paid. Furthermore, although Mr. Rotches tried to shift the blame to Bankers Trust Company for stopping payment on the checks to A&B, he admitted that he agreed with the bank that payment on the checks should be stopped. Specifically, he testified (Tr. 157-58):

> Q. Now prior to Bankers Trust coming on the scene, who controlled decisions of what bills got paid, what actions were taken with respect to your accounts payable and receivable?
>
> A. Prior to Bankers Trust --
>
> Q. Right.
>
> A. I did.
>
> Q. And after Bankers Trust came in, who controlled those decisions?
>
> A. Bankers Trust controlled those decisions as well as I controlled it up to the point of A&B getting into trouble. If A&B wants to close down I, of course, had to tell Bankers Trust. Bankers Trust took over complete control of all monies after that, by their right.
>
> Q. Who caused those checks that were issued in late April 1984 to A&B to be stopped?
>
> A. Bankers Trust demanded that they be stopped.
>
> Q. And you complied?
>
> A. Of course I complied.
>
> Q. Was that pursuant to your agreement with them?
>
> A. That was pursuant to the agreement between me, A&B and Bankers Trust and the letter of agreement holds me binded to it.
>
> Q. You're referring to inter-creditor agreement?
>
> A. Yes, of course.
>
> Q. Now the decision with respect to not pay A&B with respect to those transactions from April 16, 1984, until May 7, 1984, was that an ongoing decision as to each and every bill or was that just one decision made?
>
> A. There was never a check ever stopped by me to A&B or with any other company.
>
> Q. The question, though, is is were there a series of decisions made to attempt to recoup the losses from A&B or was it one

act that determined not paying those 18 days approximately worth of bills?

A. When A&B that Wednesday told me they are closing down, I had no choice but to get my money back, was to stop the checks, I spoke to Bankers Trust, we both agreed to both checks have to be stopped because of the money that A&B owes me.

Moreover, even if the decision to stop payment on the checks had been made solely by Bankers Trust Company, that would not excuse respondents' violations. If a packer does not have adequate finances so that its bank is unwilling to honor its checks in payment for meat or meat products, the packer is responsible for any violations that occur when the bank does not honor its checks. Accordingly, the ALJ properly gave no weight to the "INTER-CREDITOR AGREEMENT."

Respondents contend that the $50,000 civil penalty imposed by the ALJ is excessive. However, it is quite modest considering the gravity and number of respondents' violations, and the size of respondents' business (before it ceased operations). The Act authorizes a maximum civil penalty of $10,000 for each violation (7 U.S.C. § 193(b)). The evidence here proves 116 violations. As stated by the ALJ, the sanction recommended by complainant based on 10% of the amount estimated to be due and owing by respondents to A&B is $210,000. The penalty imposed by the ALJ is less than one-fourth that amount (or about 2 1/3% of the amount owed), because of the mitigating circumstances referred to by the ALJ. The $50,000 civil penalty imposed by the ALJ is reasonable (but quite modest), considering all of the circumstances found here.

It is the policy of this Department to impose severe sanctions for violations of any of the regulatory programs administered by the Department that are repeated or that are regarded by the administrative officials and the Judicial Officer as serious, in order to serve as an effective deterrent not only to the respondents, but also to other potential violators. The basis for the Department's severe sanction policy is set forth at great length in numerous decisions, *e.g.*, *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. ____, slip op. at 213-42 (Mar.

19, 1987), which is set forth as an appendix to this decision. [3]

In addition, the sanctions imposed under the Packers and Stockyards Act in recent years have been much more severe than during earlier years, *e.g.*, *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. ____ (Mar. 19, 1987) (10-year suspension and $30,000 civil penalty for increasing prices and weights in commission purchases); *In re Welch*, 45 Agric. Dec. ____ (Sept. 25, 1986) (decision as to Benson) ($10,000 civil penalty and 1-year prohibition from engaging in business subject to the Act); *In re Garver*, 45 Agric. Dec. ____ (June 19, 1986), *appeal docketed*, No. 86-4081 (6th Cir. Nov. 28, 1986) (2-year suspension); *In re Holiday Food Services, Inc.*, 45 Agric. Dec. ____ (May 8, 1986) ($50,000 civil penalty), *appeal docketed*, No. 86-7332 (9th Cir. June 6, 1986); *In re Corn State Meat Co.*, 45 Agric. Dec. ____ (May 8, 1986) ($50,000 civil penalty); *In re Blackfoot Livestock Commission Co.*, 45 Agric. Dec. ____ (Mar. 7, 1986) (6-month suspension), *aff'd*, 810 F.2d 916 (9th Cir. 1987); *In re Farmers & Ranchers Livestock Auction Inc.*, 45 Agric. Dec. ____ (Feb. 27, 1986) (decision as to Millspaugh) (5-year suspension, but permitting respondent to be employed as an auctioneer after 1 year); *In re Saylor*, 44 Agric. Dec. ____ (Sept. 20, 1985) (decision on remand) (8-month suspension and $10,000 civil penalty); *In re ITT Continental Baking Co.*, 44 Agric. Dec. ____ (Mar. 18, 1985), *final consent decision*, 44

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[3] Severe sanctions issued pursuant to the Department's severe sanction policy were sustained, *e.g.*, in *In re Blackfoot Livestock Comm'n Co.*, 45 Agric. Dec. ____ (Mar. 7, 1986), *aff'd*, 810 F.2d 916 (9th Cir. 1987); *In re Collier*, 38 Agric. Dec. 957, 971-72 (1979), *aff'd per curiam*, 624 F.2d 190 (9th Cir. 1980) (unpublished), *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1362-63 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980); *In re Muehlenthaler*, 37 Agric. Dec. 313, 330-32, 337-52, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 549-51 (1977), *aff'd sub nom. Van Wyk v. Bergland*, 570 F.2d 701 (8th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1133-34 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978) (unpublished), *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1561 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Catanzaro*, 35 Agric. Dec. 26, 31-32 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467 (1977); *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 796, 801 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976), *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 750, 762 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 920 (1977); *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 171, 178, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 133, 145-60, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1913-14 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 515, 539-50 (1974), *aff'd per curiam*, 510 F.2d 966 (4th Cir. 1975) (unpublished); *In re Miller*, 33 Agric. Dec. 53, 64-80, *aff'd per curiam*, 498 F.2d 1088, 1089 (5th Cir. 1974).

Agric. Dec. ____ (Oct. 24, 1985) ($10,000 civil penalty); *In re Powell*, 44 Agric. Dec. ____ (Mar. 7, 1985) (5-year suspension for failure to pay for livestock), *appeal denied*, 44 Agric. Dec. ____ (May 28, 1985) (appeal not timely filed); *In re Mid-West Veal Distributors*, 43 Agric. Dec. ____ (July 13, 1984) ($77,000 civil penalty, with $27,000 suspended); *In re Mayer*, 43 Agric. Dec. ____ (Apr. 12, 1984) (decision as to Doss) (2-year suspension), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re Peterman*, 42 Agric. Dec. ____ (Dec. 12, 1983), *aff'd*, 770 F.2d 888 (10th Cir. 1985) ($20,000 civil penalty).

In *In re Garver*, *supra*, 45 Agric. Dec. ____, slip op. at 17-21 (June 19, 1986), it is explained that 2-to-5-year suspension orders are now issued in the case of serious failures to pay for livestock where 30-to-60-day suspension orders would have been issued in comparable cases a few years ago. For the foregoing reasons, the following order should be issued. [4]

Order

Respondent Rotches Pork Packers, Inc., its officers, directors, agents and employees, and respondent David A. Rotches, directly or through any corporate or other device, shall cease and desist from failing to pay, and from failing to pay when due, for meat and meat food products purchased.

Respondent David A. Rotches is hereby assessed a civil penalty of $50,000. This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to Allan R. Kahan, Office of the General Counsel, U.S. Department of Agriculture, Room 2446, South Building, Washington, D.C. 20250-1400.

APPENDIX

Excerpt from In re Spencer Livestock Commission Co., 46 Agric. Dec. ____, slip op. at 213-42 (Mar. 19, 1987).

[Excerpt omitted.—Editor.]

)N, INC.

5, 1987.

Purchasing livestock while insolvent—
penalty.

has been unreasonably delayed in the Office
nd 1986, the workload of the Judicial Officer
straints, an assistant was not obtained until

The Judicial Officer affirmed Judge McGrail's order assessing a $3,000 civil penalty and ordering respondent to cease and desist from engaging in business without an adequate bond or its equivalent, purchasing livestock while insolvent without paying at the time of purchase with cash, certified check or wire transfer, and failing to pay, when due, the full purchase price of livestock. Respondent's failure to file a timely answer and deny the allegations of the complaint constitutes an admission of the allegations in the complaint and a waiver of hearing. However, even if respondent's defense had been timely filed, it would have been to no avail. Respondent's alleged present compliance with the Act is irrelevant in determining the sanction for past violations. The fact that respondent is allegedly not now operating subject to the Act does not prevent the issuance of a cease and desist order or the imposition of sanctions for respondent's past violations.

Dennis Becker, for complainant.

Respondent, pro se.

Initial Default decision and order issued by *Edward H. McGrail, Administrative Law Judge.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*). [1] An initial default Decision and Order was filed on February 18, 1987, by Administrative Law Judge Edward H. McGrail (ALJ) assessing a $3,000 civil penalty and ordering respondent to cease and desist from engaging in business without an adequate bond or its equivalent, purchasing livestock while insolvent without paying at the time of purchase with cash, certified check or wire transfer, and failing to pay, when due, the full purchase price of livestock.

On March 9, 1987, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 C.F.R. § 2.35). [2] The case was referred to the Judicial Officer for decision on March 23, 1987.

Based upon a careful consideration of the record, the initial Decision and Order is adopted as the final Decision and Order in this case, ex

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[1] *See generally* Campbell, *The Packers and Stockyards Act Regulatory Program*, in 1 Davidson, Agricultural Law, ch. 3 (1981 and 1986 Cum. Supp.), and Carter, *Packers and Stockyards Act*, in 10 Harl, Agricultural Law, ch. 71 (1980).

[2] The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program) (December 1962-January 1971).

cept that the effective date of the order is changed in view of respondent's appeal, and specific provisions are added as to the manner in which the civil penalty shall be paid. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent willfully violated the Act and the regulations promulgated thereunder by the Secretary of Agriculture (9 C.F.R. § 202.1 *et seq.*).

Copies of the Complaint and Notice of Hearing and Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were served on the respondent by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the Complaint and Notice of Hearing.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the Complaint and Notice of Hearing, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact. This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. (a) A. W. Schmidt & Son, Inc., hereinafter referred to as the respondent, is a Maryland corporation. Its business mailing address is 2136 Harford Road, Baltimore, Maryland 21218.

(b) The respondent is, and at all times material herein was:

(1) Engaged in the business of buying livestock in commerce for the purposes of slaughter, and of manufacturing or preparing meats or meat food products for sale or shipment in commerce; and

(2) A packer within the meaning of and subject to the provisions of the Act.

(c) Respondent's annual purchases of livestock exceed $500,000.

2. The financial condition of the respondent does not meet the requirements of the Act in that:

(a) As of December 31, 1985, the respondent's current liabilities exceeded its current assets. As of that date, said respondent had current liabilities of $307,241.22, and current assets of $211,562.92, resulting in an excess of current liabilities over current assets of $95,678.30.

(b) As of March 31, 1986, the respondent's current liabilities exceeded its current assets. As of that date, said respondent had current liabilities of $339,319.44, and current assets of $227,848.89, resulting in an excess of current liabilities over current assets of $111,470.55.

(c) The respondent's current liabilities presently exceed its current assets.

3. The respondent held a bond in the amount of $10,000, which bond lapsed on July 4, 1986. Respondent was notified that if it continued its livestock operations under the Act without providing adequate bond coverage or its equivalent, it would be in violation of section 202(a) of the Act (7 U.S.C. § 192(a)), and sections 201.29 and 201.30 of the regulations. Notwithstanding such notice, respondent has continued to engage in business as a buyer of livestock for slaughter and as a packer without maintaining an adequate bond or its equivalent as required by the Act and the regulations.

4. The respondent on or about the dates and in the transactions set forth in paragraph IV of the Complaint and Notice of Hearing and at numerous other times during calendar year 1986, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

Conclusions

By reason of the facts found in Finding of Fact 2 herein, the respondent's financial condition does not meet the requirements of the Act (7 U.S.C. § 204).

By reason of the facts found in Finding of Fact 3 herein, the respondent has willfully violated section 202(a) of the Act (7 U.S.C. § 192(a)) and sections 201.29 and 201.30 of the regulations (9 C.F.R. §§ 201.29, 201.30).

By reason of the facts found in Finding of Fact 4 herein, the respondent has willfully violated sections 202(a) and 409 of the Act (7 U.S.C. §§ 192(a), 228b).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Under the Department's rules of practice governing formal adjudicatory administrative proceedings instituted by the Secretary, a respondent's failure to file a timely answer or deny the allegations of the complaint constitutes an admission of the allegations in the complaint and a waiver of hearing. Specifically, the rules of practice provide (7 C.F.R. §§ 1.136(a)-(c), .139, .141(a)):

> § 1.136 *Answer.*
>
> (a) *Filing and service.* Within 20 days after the service of the complaint . . . the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding. . . .

(b) *Contents.* The answer shall: (1) Clearly admit, deny, or explain each of the allegations of the Complaint and shall clearly set forth any defense asserted by the respondent; or

(2) State that the respondent admits all the facts alleged in the complaint; or

(3) State that the respondent admits the jurisdictional allegations of the complaint and neither admits nor denies the remaining allegations and consents to the issuance of an order without further procedure.

(c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

. . . .

§ *1.139 Procedure upon failure to file an answer or admission of facts.*

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk.

Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

. . . .

§ *1.141 Procedure for Hearing.*

(a) *Request for Hearing.* Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed. Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

The complaint contained allegations virtually identical to the findings of fact, *supra*, and advised respondent that an answer must be filed with the Hearing Clerk, and that failure to file an answer shall constitute an admission of all the material allegations of the complaint and a waiver of hearing (Complaint at 4).

In addition, the letter from the Hearing Clerk serving a copy of the complaint on respondent expressly and accurately advised respondent of the effect of failure to file an answer or plead specifically to any allegation of the complaint. The letter states:

> In accordance with the rules of practice governing proceedings under the Act, a copy of which is enclosed, you will have 20 days from the receipt of this letter within which to file with the Hearing Clerk, an original and *four* copies of your answer. Your answer should contain a definite statement of the facts which constitute the grounds of defense, and should specifically admit, deny, or explain each of the allegations of the complaint. Failure to file an answer to or plead specifically to any allegation of the complaint shall constitute an admission of such allegation.
>
> Within the same time allowed for the filing of your answer, you may, if you wish, request an oral hearing. Failure to file such a request will constitute a waiver, on your part, of oral hearing.

Respondent failed to answer the complaint. Only when served with complainant's January 16, 1987, Motion for Adoption of Proposed Decision did respondent file anything with the Department. Even then, respondent's "Proposed Decision" did not deny the allegations of the complaint.

Accordingly, the default order was properly issued in this case. Although on rare occasions default decisions have been set aside for good cause shown or where complainant did not object, [3] respondent has

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[3] *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (remand order), *final decision*, 42 Agric. Dec. 1173 (1983) (default decision set aside because service of the complaint by registered and regular mail was returned as undeliverable, and respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted); *In re J Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (remand order), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Christ*, L.A.W.A. Docket No. 24 (Nov. 12, 1974) (remand order), *final decision*, 35 Agric. Dec. 195 (1976); and *see In re Gallop*, 40 Agric. Dec. 217 (order vacating default decision) (case remanded to determine whether just cause exists for permitting late answer), *final decision*, 40 Agric. Dec. 1254 (1981).

shown no basis for setting aside the default decision here. [4]

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[4] *See In re Carter*, 46 Agric. Dec ____ (Mar. 3, 1987) (default order proper where timely answer not filed; respondent properly served where complaint sent to his last known address was signed for by someone); *In re McDaniel*, 45 Agric. Dec. ____ (Dec. 8, 1986) (default order proper where timely answer not filed); *In re Mayes*, 45 Agric. Dec. ____ (Nov. 24, 1986) (default order proper where answer not filed); *In re Pieszko*, 45 Agric. Dec. ____ (Nov. 12, 1986) (default order proper where answer not filed), *In re Henson*, 45 Agric. Dec. ____ (Nov. 4, 1986) (default order proper where answer admits or does not deny material allegations), *In re Guffy*, 45 Agric. Dec. ____ (Oct. 20, 1986) (default order proper where answer, filed late, does not deny material allegations), *In re Blaser*, 45 Agric. Dec. ____ (Sept. 9, 1986) (default order proper where answer does not deny material allegations); *In re Northwest Orient Airlines*, 45 Agric. Dec. ____ (Sept 9, 1986) (default order proper where timely answer not filed); *In re Schwartz*, 45 Agric. Dec. ____ (Aug. 12, 1986) (default order proper where timely answer not filed); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. ____ (July 9, 1986) (default order proper where answer, filed late, does not deny material allegations), *In re Gutman*, 45 Agric Dec. ____ (June 17, 1986) (default order proper where answer does not deny material allegations); *In re Daul*, 45 Agric. Dec. ____ (Mar 6, 1986) (default order proper where answer, filed late, does not deny material allegations), *In re Eastern Air Lines, Inc* , 44 Agric. Dec. ____ (Sept. 23, 1985) (default order proper where timely answer not filed, irrelevant that respondent's main office did not promptly forward complaint to its attorneys), *In re Cuttone*, 44 Agric Dec. ____ (Aug. 20, 1985) (default order proper where timely answer not filed, respondent Carl D. Cuttone properly served where complaint sent by certified mail to his last business address was signed for by Joseph A. Cuttone), *aff'd per curiam*, 804 F 2d 153 (D.C. Cir. 1986) (unpublished), *In re Corbett Farms, Inc.*, 43 Agric Dec. ____ (Nov. 1, 1984) (default order proper where timely answer not filed, respondent cannot present evidence that it is unable to pay $54,000 civil penalty where it waived its right to a hearing by not filing a timely answer), *In re Jacobson*, 43 Agric Dec. ____ (June 26, 1984) (default order proper where timely answer not filed); *In re Buzun*, 43 Agric. Dec. ____ (June 13, 1984) (default order proper where timely answer not filed; respondent Joseph Buzun properly served where complaint sent by certified mail to his residence was signed for by someone named Buzun); *In re Mayer*, 43 Agric. Dec. ____ (Apr. 12, 1984) (decision as to respondent Doss) (default order proper where timely answer not filed; irrelevant whether respondent was unable to afford an attorney), *appeal dismissed*, No 84-4316 (5th Cir. July 25, 1984); *In re Lambert*, 43 Agric. Dec ____ (Jan. 4, 1984) (default order proper where timely answer not filed); *In re Berhow*, 42 Agric. Dec. 764 (1983) (default order proper where timely answer not filed), *In re Rubel*, 42 Agric. Dec. 800 (1983) (default order proper where respondent acted without an attorney and did not understand the consequences and scope of a suspension order); *In re Pastures, Inc.*, 39 Agric. Dec. 395, 396-97 (1980) (default order proper where respondents misunderstood the nature of the order that would be issued); *In re Seal*, 39 Agric. Dec. 370, 371 (1980) (default order proper where timely answer not filed); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (default order not set aside because of respondents' contentions that they misunderstood the Department's procedural requirements, when there is no basis for the misunderstanding).

The requirement in the Department's rules of practice that respondent deny or explain any allegation of the complaint and set forth any defense in a timely answer is necessary to enable this Department to handle its large workload in an expeditious and economical manner. During the last fiscal year, the Department's five ALJ's (who do not have law clerks) disposed of 496 cases. The Department's Judicial Officer disposed of 42 cases In a recent month, 66 new cases were filed with the Hearing Clerk.

The courts have recognized that administrative agencies "should be 'free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'" [5] If respondent were permitted to contest some of the allegations of fact at this late date, or raise new issues, all other respondents in all other cases would have to be afforded the same privilege Permitting such practice would greatly delay the administrative process and would require additional personnel. However, there is no basis for permitting respondent to present matters by way of defense at this time.

Moreover, even if respondent were permitted to raise the issues presented in its "Proposed Decision," it would be to no avail. Respondent contends that it is not now violating the Act, but it is well-settled that present compliance is irrelevant in determining the sanction for past violations. [6] Respondent also contends that it is not now operating subject to the Act, but that, too, does not prevent the issuance of a cease and desist order or the imposition of sanctions for

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[5] *Cella* v. *United States*, 208 F.2d 783, 789 (7th Cir 1953), *cert. denied*, 347 U.S. 1016 (1954), quoting from *FCC* v. *Pottsville Broadcasting Co.*, 309 U S. 134, 143 (1940), *accord Swift & Co.* v *United States*, 308 F.2d 849, 851-52 (7th Cir 1962)

[6] *In re Mountainside Butter & Egg Co.*, 38 Agric. Dec. 789, 800 (1978) (remand order), *final decision*, 39 Agric. Dec. 862, 863-64 (1980), *aff'd*, No. 80-3898 (D.N.J. June 23, 1982), *aff'd mem* , 722 F.2d 733 (3d Cir. 1983), *cert denied*, 104 S. Ct. 1417 (1984); *In re American Fruit Purveyors, Inc.*, 38 Agric Dec. 1372, 1387-88 (1979), *aff'd per curiam*, 630 F.2d 370 (5th Cir 1980), *cert denied*, 450 U.S. 997 (1981), *In re L R. Morris Produce Exch , Inc.*, 37 Agric. Dec. 1112, 1120 (1978); *In re Breckenridge Auction & Sales Co.*, 36 Agric. Dec. 1522, 1530 (1977); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 135, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re Miller*, 33 Agric. Dec. 53, 62, 81, *aff'd per curiam*, 498 F.2d 1088, 1089 (5th Cir. 1974); and *see In re Catanzaro*, 35 Agric. Dec. 26, 35 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec 467.

respondent's past violations. [7]

For the foregoing reasons, the following order should be issued.

Order

Respondent A. W. Schmidt & Son, Inc., its successors, officers, directors, agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Engaging in business in any capacity for which bonding is required under the Act and regulations without having and maintaining an adequate bond or its equivalent, as required by the Act and regulations;

2. Purchasing livestock while insolvent, i.e., while its current liabilities exceed its current assets, without paying for such livestock at the time of purchase with U.S. currency, certified check or wire transfer of funds; and

3. Failing to pay, when due, the full purchase price of livestock.

The respondent is hereby assessed a civil penalty of $3,000. This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to Dennis Becker, Office of General Counsel, U.S. Department of Agriculture, Room 2446, South Building, Washington, D.C. 20250-1400.

In re: A. W. SCHMIDT & SON, INC.

P. & S. Docket No. 6791

Decision and order filed April 6, 1987.

The Judicial Officer denied a petition to reconsider, stating that the $3,000 civil penalty is quite modest considering civil penalties recently imposed under the Act.

Dennis G. Becker, for Complainant.

Respondent, pro se

Initial decision and order by *Edward H. McGrail, Administrative Law Judge.*

Decision by Donald A. Campbell, Judicial Officer.

ORDER DENYING PETITION TO RECONSIDER

On April 14, 1987, respondent filed a letter in the nature of a petition to reconsider, contending that its violations were not willful, and

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[7] *In re ITT Continental Baking Co.*, 44 Agric. Dec. ____ (Mar. 18, 1985) (remand order), *final order*, 44 Agric. Dec. ____ (Oct. 24, 1985) (consent order); *In re Trenton Livestock, Inc.*, 41 Agric. Dec. 1965, 1976 (1982); *In re Roberts Enters., Inc.*, 41 Agric. Dec. 80, 83-84 (1982); *In re Sterling Colo. Beef Co.*, 39 Agric. Dec. 184, 238-39 (1980), *appeal dismissed*, No. 80-1293 (10th Cir. Aug. 11, 1980); *In re DeJong Packing Co.*, 36 Agric. Dec. 1181, 1218-21 (1977), *aff'd*, 618 F.2d 1329 (9th Cir.) (2-1 decision), *cert. denied*, 449 U.S. 1061 (1980); *In re Shatkin*, 34 Agric. Dec. 296, 313 (1975).

that a $3,000 civil penalty "would certainly hurt us in an already tight cash flow situation."

However, the facts set forth in the initial decision fully support the $3,000 civil penalty imposed. In fact, the civil penalty is quite modest considering civil penalties recently imposed under the Packers and Stockyards Act. See *In re Spencer Livestock Comm'n Co.*, 46 Agric. Dec. ____, slip op. at 208-10 (Mar. 19, 1987).

For the foregoing reasons, the petition for reconsideration should be denied.

Order

Respondent's petition for reconsideration is denied.

In re: SPENCER LIVESTOCK COMMISSION, Co. and MIKE DONALDSON.

P. & S. Docket No. 6254

Decision and order filed April 29, 1987.

Order by Donald A. Campbell, Judicial Officer.

STAY ORDER

The civil penalty and suspension provisions of the order previously issued in this case are hereby stayed pending the outcome of proceedings for judicial review.

The cease and desist provisions shall remain in effect.

PERISHABLE AGRICULTURAL COMMODITIES ACT

LIST OF DECISIONS REPORTED

Disciplinary Decisions:

Reparation Decisions:

LIST OF DECISIONS REPORTED

LIST OF DECISIONS REPORTED

PERISHABLE AGRICULTURAL COMMODITIES ACT

DISCIPLINARY DECISIONS

In re: CARPENITO BROS., INC. a/t/a 5 C's FRUIT & PRODUCE

PACA Docket No. 2-6846

Order filed April 28, 1987.

Order by Donald A. Campbell, Judicial Officer.

STAY ORDER

The order previously issued in this case is hereby stayed pending the outcome of proceedings for judicial review. Done at Washington, D.C.

In re: ROBERT W. CASTO d/b/a PRIMA CITRUS & FRUIT EXCHANGE.

PACA Docket No. 2-7294.

Decision and order filed March 9, 1987.

Failure to make full payment promptly—Willful, flagrant and repeated violations of the Act—Application for license denied—Publication of the facts.

Respondent failed to make full payment promptly for 24 lots of produce purchased from five (5) sellers in commerce in the amount of $166,869.15. Additionally, three reparation default orders had been issued against respondent. It was found and published that respondent thereby committed willful, flagrant and/or repeated violations of the Perishable Agricultural Commodities Act (7 U.S C. § 499 b). It was further found that because respondent engaged in practices prohibited by the Act its application for a license under the Act should be denied.

Andrew Y. Stanton, for complainant.

Paul E. Steen, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*; hereinafter the "PACA"), the Regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1 through 46.45), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By the Secretary (7 C.F.R. 1.130 through 1.151; hereinafter the "Rules of Practice").

The proceeding was instituted by a Notice of Show Cause and Complaint filed on September 4, 1986, by the Director, Fruit and Vegetable Divisions, Agricultural Marketing Service, United States Department of

Agriculture. It is alleged in the Notice to Show Cause and Complaint, that Robert W. Casto, d/b/a Prima Citrus & Fruit Exchange (hereinafter "respondent"), violated section 2 of the PACA (7 U.S.C. § 499b) by failing to make full payment promptly of the agreed purchase prices for 24 lots of perishable agricultural commodities purchased from five sellers, for a total of $166,869.15. It is also alleged that respondent having engaged in practices of a character prohibited by the PACA, and pursuant to section 4d of the PACA (7 U.S.C. § 499d(d)), his August 5, 1986, application for license should therefore not be granted.

Respondent filed an answer on October 16, 1986, in which he denied violating the PACA, or intentionally engaging in practices prohibited by the PACA, and requested that a PACA license be granted.

An oral hearing was held on December 10, 1986, in Phoenix, Arizona. Complainant was represented by Andrew Y. Stanton, Esq., Office of the General Counsel, U.S. Department of Agriculture, Washington, D. C. 20250. Respondent was represented by Paul E. Steen, Esq., Suite 2300, Valley Bank Center, Phoenix, Arizona 85073. At the close of the hearing the time was set for the filing of briefs.

The findings and conclusions which follow are basically those contained in complainant's brief, and proposed findings and conclusions. A review of the record discloses that the defenses asserted by respondent lack merit. Likewise, the points and authorities cited by complainant are well established, convincing, and leave no doubt that respondent violated the PACA and that respondent's application for a PACA license should be denied.

Findings of Fact

1. Respondent, Robert W. Casto d/b/a Prima Citrus & Fruit Exchange, is an individual whose address is P.O. Box 769, Queen Creek, Arizona 85242.

2. Respondent was not licensed under the PACA at the time of the violations alleged in the Notice to Show Cause and Complaint (hereafter called "Complaint"). However, at the time of the alleged violations, respondent was operating subject to license, pursuant to section 3(a) of the PACA (7 U.S.C. § 499c(a)).

3. During the period August 1985 through December 1985, respondent purchased received, and accepted 24 lots of perishable agricultural commodities, from five sellers in interstate and foreign commerce, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $166,869.15. The details of these transactions are more fully set forth in paragraph 6 of the Complaint.

4. On October 7, 1986, October 15, 1986, and November 19, 1986, reparation default orders were issued against respondent in the following cases, respectively: *Associated Citrus Packers v. Robert W. Casto*

d/b/a Prima Citrus & Fruit Exchange, PACA Docket No. RD-86-436, for $43,902.00 plus interest; *Fresh Western Marketing, Inc. v. Robert W. Casto d/b/a Prima Citrus & Fruit Exchange*, PACA Docket No. RD-86-467, for $3,366.85, plus interest; and *Harold Tateyama & Son, Inc. v. Robert W. Casto d/b/a Prima Citrus & Fruit Exchange*, PACA Docket No. RD-87-15, for $3,175.00 plus interest. (Cx. 10). All of the sales to respondent involved in the reparation proceedings occurred in 1985. (Cx. 3, 4, 8).

5. Prior to the date on which respondent filed his application for a PACA license, August 5, 1986, respondent engaged in practices of a character prohibited by the PACA.

Conclusions

Upon the basis of the record evidence it is concluded:

1. Respondent has committed willful, flagrant and/or repeated violations of section 2 of the PACA (7 U.S.C. § 499b) by failing to make full payment promptly for 24 lots of perishable agricultural commodities in the amount of $166,869.15 purchased from five sellers in the course of interstate and foreign commerce, and

2. Respondent has engaged in practices of a character prohibited by the PACA, justifying denial of respondent's August 5, 1986, license application.

Discussion

I

Section 2(4) of the PACA (7 U.S.C. § 499b(4)) makes it unlawful, for any commission merchant, dealer, or broker to fail to "make full payment promptly" of its obligations with regard to transactions involving perishable agricultural commodities made in interstate commerce. Insofar as is pertinent here, "full payment promptly" is defined (7 C.F.R. § 46.2(aa)(5)) as requiring payment of the agreed purchase prices for produce within 10 days after the day on which the produce is accepted.

Respondent has not disputed most of the factual allegations made in the Complaint. Respondent has even prepared a list of his accounts payable, as of June 30, 1986, which shows respondent owing all the sellers listed in the Complaint the exact amounts alleged by complainant as past due and owing, except for Harold Tateyama & Sons, Inc., who is shown as owed $500.00 more than complainant has alleged. (Cx. 2)

Respondent has asserted certain defenses, none of which has merit.

In his answer, respondent contends that one of the sellers set forth in the Complaint, Associated Citrus Packers, Inc., Yuma, Arizona, has secured a judgment against respondent in the Superior Court of the State of Arizona, and as a result, that seller should not be included in

the Complaint. Respondent is apparently relying upon section 5(b) of the PACA (7 U.S.C. § 499e(b)), which provides that when an action is brought seeking damages against a commission merchant, dealer or broker by someone claiming to be injured by him as a result of his violation of section 2 of the PACA, the action for damages can be brought either by complaint to the Secretary of Agriculture, or by suit in court. The action for damages contemplated by that provision is a reparation proceeding under sections 6 and 7 of the PACA (7 U.S.C. §§ 499f and g). The present proceeding is a disciplinary action brought by complainant pursuant to section 8 of the PACA (7 U.S.C. § 499h), in which complainant does not seek damages but merely a finding of willful, flagrant and/or repeated violations of section 2 of the PACA. The filing of a lawsuit in state court by one of the sellers set forth in the Complaint, while perhaps prohibiting such seller from prosecuting a reparation complaint before the Secretary of Agriculture, has no effect on his inclusion in this disciplinary action.

Respondent's employee, David Peel, alleged at the hearing that respondent had paid Associated Citrus Packers, Inc., $2,000.00 in August or September, 1986. (Tr. p. 75) This is directly contradicted by a November 20, 1986, letter to the Department of Agriculture by Thomas R. Oliveri, representing Associated Citrus Packers, Inc., in a reparation action against the respondent (Cx No. 11). In his letter, Mr. Oliveri states "no monies have come back from Prima Citrus and Fruit Exchange..."

However, even if respondent had made payment of $2,000.00, he does not deny having failed to pay Associated Citrus Packers, Inc., the remaining $31,790.30 alleged in the Complaint to be past due and owing. Further, since the $2,000.00 was not allegedly paid until August or September, 1986, payment was made eight or nine months after it was due, in December 1985, and January 1986. Therefore, respondent has failed to make full payment promptly of the entire $33,790.30 as alleged in the Complaint.

Respondent argues in his answer that much of the produce shipped by Pure Gold, Inc., Redlands, California, was not of the quality represented and, therefore, not worth the $98,489.40 set forth in the Complaint. However, respondent's employee, David Peel, testified at the hearing that he wasn't aware of any inspection reports documenting the allegedly inferior quality, and couldn't say for certain that the alleged problems were the responsibility of Pure Gold, Inc., rather than a transit problem. (Tr. p. 75) Respondent thus has not presented any reliable evidence that he owes Pure Gold, Inc., anything less than the $98,489.40 alleged by complainant. Further, respondent has admitted liability for the $98,489.40 in his accounts payable list. (Tr. p. 62; Cx 2)

Finally, respondent urged at the hearing and in his brief that his indebtedness resulted from the unauthorized acts of one of his employees, Ross Carder, who deceived the company from August through December 1985. Respondent claims that during this period, Carder was employed as respondent's accountant who handled the business transactions. According to respondent, Carder at all times advised respondent that the bills were being paid and the business being handled properly. However, on February 16, 1986, Carder left respondent's employ, taking with him important documents and other essential elements of respondent's business. It was then learned that Carder had improperly used funds, which should have gone to produce creditors, for his own and other persons' benefit.

However, respondent's attempt to set forth mitigating circumstances is no excuse for his violations, and cannot be considered grounds for a less severe sanction than that requested by complainant. The Judicial Officer has stated many times that excuses for nonpayment are routinely rejected, as "the Act calls for payment - not excuses." *Bananas, Inc.*, 42 A.D. 588, 596 (1983); *V.P.C., Inc.*, 41 A.D. 734, 746-47 (1982).

Moreover, the record indicates that respondent used poor business judgment which contributed to Carder's improper activities. Respondent's employee, Mr. Peel, testified that Mr. Carder had a degree in engineering, rather than in business or accounting. (Tr. p. 64) This factor alone raises questions concerning the soundness of respondent's decision to hire Mr. Carder to take responsibility for his business and accounting functions. Further, respondent admitted that he never checked over Mr. Carder's work. (Tr. p. 52) Respondent's poor business practices are well stated by respondent himself: "I gave him [Carder] too much power, too much authority, and it's my fault I didn't follow up on a lot of things." (Tr. p. 56) In addition, respondent has admitted that he has made no effort to recover the approximately $200,000.00 he alleges was improperly taken from the business by Mr. Carder. (Tr. p. 53) Not only hasn't respondent initiated a lawsuit, but he hasn't even made a complaint to the police. (Tr. p. 53) If the $200,000.00 were recovered, it would be sufficient to pay in full all the produce creditors set forth in the Notice to Show Cause and Complaint.

II

Respondent argues in his brief that his violations were not willful or flagrant. However, respondent's failures to make timely payment, as alleged in the complaint, are clearly in violation of the prohibitions of section 2 of the PACA (7 U.S.C. 499b). *Atlantic Produce*, 35 A.D. 1631 (1976), *aff'd mem.*, 568 F.2d 772 (CA 4), *cert. den.*, 439 U.S. 819 (1978). Moreover, the numerous violations committed by respondent

constitute flagrant and repeated violations of the PACA. *American Fruit Purveyors v. United States*, 630 F.2d 370, (CA 5, 1980); *G. Steinberg & Son, Inc.*, 32 A.D. 236 (1973), *aff'd sub. nom., George Steinberg and Son, Inc. v. Butz, supra*, 491 F.2d 988. (CA 2).

Although a finding of willfulness is not required here, as a sanction of revocation is not being sought, these violations were willful. A violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by a statute or if a person carelessly disregards the requirements of a statute. *Henry S. Shatkin*, 34 A. D. 296 (1975); *G. Steinberg & Son, supra*, 32 A.D. at 263-269; *Goodman v. Benson*, 286 F.2d 896, 900 (CA. 7, 1961). Respondent admittedly used poor judgment in running his business. Respondent should have had sufficient capitalization with which to operate but did not and can-

Pursuant to the Rules of Practice, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in section 1.145 of the Rules of Practice (7 C.F.R. 1.145).

Copies hereof shall be served upon the parties.

[This decision and order became final April 18, 1987.—Editor.]

In re: FRESHVILLE PRODUCE DISTRIBUTORS, INC.

PACA Docket No. 2-7330.

Decision and order filed February 6, 1987.

Failure to pay promptly—Publication of the facts—Default

Andrew Stanton, for complainant.

Respondent, pro se.

Decision and Order issued by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on October 3, 1986, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period September 1985 through January 1986, respondent purchased, received, and accepted, in interstate and foreign commerce, from 29 sellers, 283 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $838,425.40.

A copy of the complaint was served upon respondent, which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. 1.139).

Findings of Fact

1. Respondent, Freshville Produce Distributors, Inc., is a corporation, whose address is 1367 Viele Street, Bronx, New York 10474.

2. Pursuant to the licensing provisions of the Act, license number 780439 was issued to respondent on December 22, 1977. This license

was renewed annually, but terminated on December 22, 1986, pursuant to Section 4(a) of the Act (7 U.S.C. 499d(a)) when respondent failed to pay the required annual license fee.

3. As more fully set forth in paragraph 6 of the complaint, during the period September 1985 through January 1986, respondent purchased, received, and accepted in interstate and foreign commerce, from 29 sellers, 283 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $838,425.40.

Conclusions

Respondent's failure to make full payment promptly with respect to the 283 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued.

Order

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This decision and order became final April 8, 1987.—Editor.]

In re: GREAT WESTERN FARMS, INC., a/t/a FELIX ROCCO CO.

PACA Docket No. 2-7074.

Decision and order filed February 6, 1987.

Failure to pay promptly—Publication of the facts—Default

Andrew Stanton, for complainant.

Respondent, pro se.

Decision and Order issued by William J. Weber, Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on January

28, 1986, by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period June 1985 through October 1985, respondent purchased, received and accepted, in interstate and foreign commerce, from 48 sellers, 145 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balances thereof in the total amount of $537,828.07.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a default order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. 1.139).

Findings of Fact

1. Respondent, Great Western Farms, Inc., a/t/a Felix Rocco Co., is a corporation, whose address is 20 Produce Building, Harris Avenue, Providence, Rhode Island 02901.

2. Pursuant to the licensing provisions of the Act, license number 851145 was issued to respondent on May 14, 1985, but terminated on May 14, 1986, due to respondent's failure to pay the required annual license fee.

3. As more fully set forth in paragraph 5 of the complaint, during the period June 1985 through October 1985, respondent purchased, received and accepted in interstate and foreign commerce, from 48 sellers, 145 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $537,828.07.

Conclusions

Respondent's failure to make full payment promptly with respect to the 145 transactions set forth in Finding of Fact No. 3, above, constitutes repeated and/or flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued.

Order

Respondent's has committed repeated and/or flagrant violations of Section 2 of the Act (7 U.S.C. § 499(b)).

The facts and circumstances as set forth herein shall be published.

The Order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in

sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This decision and order became final April 6, 1987.—Editor.]

In re : ALBERT MILLER AND COMPANY

PACA Docket No. 2-7325

Decision and order filed February 24, 1987.

Failure to pay promptly—Willful, flagrant and repeated violations of the Act—Publication of the facts—Default.

Andrew Y. Stanton, for complainant.

Respondent, pro se.

Decision and order issued by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on September 30, 1986, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period June 1985 through December 1985, respondent purchased, received, and accepted, in interstate and foreign commerce, from 10 sellers, 116 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $663,577.46.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. 1.139).

Findings of Fact

1. Respondent, Albert Miller and Company, is a corporation, whose address is Box 268, Blue Island, Illinois 60406.

2. Pursuant to the licensing provisions of the Act, license number 002080 was issued to respondent on October 2, 1930. This license was renewed annually, but terminated on October 2, 1986, pursuant to Section 4(a) of the Act (7 U.S.C. 499d(a)) when respondent failed to pay the required annual license fee.

3. As more fully set forth in paragraph 5 of the complaint, during the period June 1985 through December 1985, respondent purchased, received, and accepted in interstate and foreign commerce, from 10 sellers, 116 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $663,577.46.

Conclusions

Respondent' s failure to make full payment promptly with respect to the 116 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued.

Order

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This decision and order became final April 6, 1987.—Editor.]

In re: ROMAN CREST FRUIT, INC.

PACA Docket No. 2-6576

Decision and order filed April 7, 1987.

Failure to pay promptly—Willful, flagrant and repeated violations of the Act—Official notice taken of respondent's voluntary petition in bankruptcy—Publication of the facts.

The Judicial Officer affirmed Judge Weber's order finding that respondent has committed willful, flagrant and repeated violations of section 2 of the Perishable Agricultural Commodities Act. Respondent failed to make full payment promptly to four consignors for 93 lots of produce from March through June 1983, totaling over $380,000, and failed to make full payment promptly to 17 sellers for 99 lots of produce totaling over $525,000. Much of those amounts remain unpaid. Official notice was taken of respondent's voluntary petition in bankruptcy and various supporting documents and proofs of claims filed by creditors. Respondent admitted all of the violations that occurred after March 31, 1983, the date its former president and major stockholder, Mr. Levatino, allegedly became unaffiliated with respondent. As to the four transactions at issue in the case, the ALJ held that they were not due and payable until after March 31, 1983, and that they had been paid in full.

Complainant's contention that the evidence does not support the ALJ's findings and conclusions as to the four transactions is without merit. Complainant argues on appeal that the ALJ erred in not granting his petition to reopen the hearing to permit testimony by the supplier in the four transactions to contradict Mr. Levatino's testimony. However, complainant should have interviewed the supplier in advance, so that complainant would have known at the time of the hearing that Mr. Levatino's testimony was false (according to the supplier). Since complainant did not request a continuance to procure rebuttal testimony, complainant is bound by the newly discovered evidence rule, and there is no good reason why complainant failed to have the supplier testify at the hearing. Although complainant is reluctant to inconvenience trade witnesses by making them testify at a hearing, such inconvenience (for at least 2 or 3 trade witnesses, in the typical case, from firms handling a substantial number of transactions) is a necessary price that must be paid to attain the benefits of the regulatory program.

Edward M. Silverstein, for complainant.

Frederick C. Stern, New York, New York, for respondent.

Initial Decision and Order by *William J. Weber, Administrative Law Judge.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*),* in which Administrative Law Judge William J. Weber (ALJ) filed an initial Decision and Order on July 16, 1986, finding that respondent has committed flagrant and repeated violations of section 2 of the Act by failing to make full payment promptly to four consignors for 93 lots of produce from March through June 1983, totaling over $380,000, and failing to make full payment promptly to 17 sellers for 99 lots of produce totaling over $525,000. Much of those amounts remains unpaid.

On August 18, 1986, complainant appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 C.F.R. § 2.35).** On September 24, 1986, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the entire record, the initial Decision and Order is adopted as the final Decision and Order in this case (with a few trivial changes), except that the effective date of the order is changed in view of the appeal. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

Preliminary Matters and Determinations

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* *See generally* Campbell, *The Perishable Agricultural Commodities Act Regulatory Program*, in 1 Davidson, Agricultural Law, ch. 4 (1981 and 1986 Cum. Supp.), and Becker and Whitten, *Perishable Agricultural Commodities Act*, in 10 Harl, Agricultural Law, ch. 72 (1980).

1. This is a disciplinary proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*; hereinafter the "PACA"), the Regulations promulgated pursuant to the PACA (7 C.F.R. 46.1 through 46.45), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary (7 C.F.R. 1.130 through 1.151; hereinafter the "Rules of Practice").

2. The proceeding was instituted by a complaint filed on June 14, 1984, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture.

3. It is alleged, in the complaint, that Roman Crest Fruit, Inc. (hereinafter "Roman Crest" or "respondent"), violated section 2 of the PACA (7 U.S.C. 499b) by failing to make full payment promptly to four consignors of the net proceeds in connection with 104 lots of fruits and vegetables, all being perishable agricultural commodities, received and accepted on consignment in interstate and foreign commerce, in the total amount of $426,111.29.

4. Additionally, it was alleged that Roman Crest further violated section 2 of the PACA by failing to make full payment promptly of the agreed purchase prices for 103 lots of fruits and vegetables, all being perishable agricultural commodities, for a total of $583,584.50.

5. Respondent failed to file a timely answer; however, it moved to set aside its default. After its default was set aside, respondent filed an answer on August 14, 1984.

6. Respondent, in its answer, generally denied the allegations in the complaint that it had violated the PACA. However, it admitted the remaining allegations made by complainant including the fact that it had been issued a PACA license on May 25, 1956, which terminated on May 25, 1984, when it failed to renew it. Roman Crest also admitted that it had filed a bankruptcy petition on November 2, 1983, in the United States Bankruptcy Court for the Southern District of New York.

7. On March 4, 1985, complainant moved for a decision on the basis of the parties' pleadings as well as respondent's admissions in its bankruptcy proceeding. Thereafter, several pleadings and memoranda were filed by each of the parties.

** The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

8. The focus of the dispute was then narrowed to only those transactions that respondent considered to be a basis on which its former president, Anthony P. Levatino, could be affected by the "responsibly connected" provision of the Act. Mr. Levatino purportedly resigned his position as an officer and director of respondent, and divested himself of his stock in respondent, on March 31, 1983.

9. Respondent did not further contest any alleged violation that occurred on or after April 1, 1983.

10. Complainant conceded that transactions 1 through 9 with Jesus Villasante and Mario Fantuzzi of Santiago, Chile, and 74-75 with Guillermo Reinoso of San Felipe, Chile, for purposes here, were not violations of the Act.

11. The motion for a decision on the pleadings was held in abeyance and a hearing was scheduled to receive evidence concerning two factual issues still in dispute: (a) whether or not transactions 87-90 constituted violations before April 1, 1983, and (b) whether transactions 105-108 were violations.

12. The oral hearing was held on December 4, 1985, in New York City, New York. Complainant was represented by Edward M. Silverstein, Esq., Office of General Counsel, U.S. Department of Agriculture, Washington, D.C. 20250. Respondent was represented by Frederick C. Stern, Esq., Blum, Haimoff, Gersen, Lipson, Garley & Niedergang, 270 Madison Avenue, New York, New York 10016.

13. At the hearing, complainant conceded that transactions 87-90 did not constitute violations of the PACA occurring prior to April 1, 1983. See Hearing Transcript pages 3-4.

14. Thus, the only remaining issue was whether or not transactions 105-108 with A & D Christopher Ranch were violations.

15. Complainant's request for official notice of respondent's voluntary petition in bankruptcy for relief under Chapter 11, and various supporting documents, and several proofs of claim filed by some creditors, is granted.

16. Complainant's motion for a decision is hereby granted, except for the four (4) transactions 105-108 on which complainant has failed to sustain the burden of proof, as further discussed later.

17. Subsequent to the December 4, 1985, hearing, complainant filed a motion to reopen the hearing for purpose of taking testimony from a witness from A & D Christopher Ranch, Inc. Complainant's motion was grounded on the premise that Levatino had not testified as complainant expected. Complainant was "surprised" by the testimony of Levatino. Respondent opposed complainant's motion to reopen.

18. However, complainant in its response to respondent's opposition to a motion for a decision filed April 15, 1985, referred to expected testimony to include a Christopher Ranch witness testifying "that Christopher's indebtedness to respondent was applied by respondent against

transactions which occurred prior in time to the four (4) transactions at issue here, and that respondent remains obligated to Christopher for those four (4) transactions." Pages 6-7, complainant's response to respondent's opposition to motion for decision, April 15, 1985.

19. There was no showing why that testimony was not presented at the hearing as scheduled; therefore, complainant's motion to reopen the hearing was denied.

Pertinent Statutory Provisions

1. Sec. 2(4).

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce-

• • • •

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection withany such transaction; or to fail to maintain the trust as required under Section 5(c);

2. Sec. 8(a).

'ver (a) the Secretary determines as provided in sec-
any commission merchant, dealer, or broker has
of section 2, or (b) any commis-
)ker has been found guilty in a
ed section 14(b) of this Act, the
s and circumstances of such vio-
:nd the license of such offender
:ty days, except that, if the viola-
he Secretary may, by order, re-
ler.

Regulations

ıe term used in the (PACA) in
or making payment without com-
.CA). 'Full payment promptly,'
ıing violations of the (PACA),

(1) Payment of the net proceeds for produce received on consignment or the pro rata share of the net profits for product received on joint account, within 10 days after the day on which the final sale with respect to each shipment is made; [1]

* * * *

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted.

* * * *

Findings and Conclusions

1. Respondent Roman Crest Fruit, Inc., is a New York corporation whose address is 1350 Lafayette Avenue, Bronx, New York 10474. [2]

2. Pursuant to the licensing provisions of the PACA, license number 164458 was issued to respondent on May 25, 1956. This license was renewed annually, but terminated on May 25, 1984, pursuant to section 4(a) of the PACA (7 U.S.C. 499(a)) when respondent failed to pay the required annual license fee. [3]

3. During the period March through June 1983, respondent received and accepted 93 lots of fruits and vegetables, all being perishable agricultural commodities, from four consignors, in interstate and foreign commerce, but failed to make full payment promptly to these consignors in the total amount of $382,250.67. [4]

4. During the period April 1983 through September 1983, Roman Crest purchased, received and accepted 99 lots of fruits and vegetables, all being perishable agricultural commodities, from 17 sellers in interstate commerce, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $525,880.90. [5]

5. Complainant has failed to sustain the burden of proof only on transactions 105–108 in the complaint.

6. On November 2, 1983, respondent filed a petition pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. 1011 *et seq.*), with the

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[1] This is the provision as it was in effect during the relevant time period. On November 20, 1984, the section was amended. *See* 40 F.R. 45735. The amendment has no bearing on this matter, but in fact requires payment as stated above or within 20 days from acceptance, whichever first occurs.

[2] Complaint sections 1 and 2.

[3] Complaint section 3.

[4] Complaint section 5, transactions 10–73, and 76–104. Respondent's answer; complainant' exhibit no. 2; hearing transcript pages 30–32, 60–61, 69–70 and 76.

[5] Complaint section 6, complainant's exhibit no. 2; hearing transcript pages 30–32, 60–61, 69–70, and 76.

United States Bankruptcy Court for the Southern District of New York, docketed as Case No. 83 Bkcy 11596. [6]

7. The acts of respondent in failing to make full payment promptly of the net proceeds for the 93 lots of produce it handled on consignment, and its failure to make full payment promptly of the agreed purchase prices for the 99 lots of produce it purchased, received, and accepted, constitute willful, flagrant and/or repeated violations of section 2 of the PACA (7 U.S.C. 499b).

Discussion

1. This is a disciplinary proceeding brought pursuant to section 8 of the PACA (7 U.S.C. 499h). The PACA was enacted to regulate and control the handling of fresh fruits and vegetables. 71 Cong. Rec. S2163 (May 29, 1929). Its passage was occasioned by the severe losses that shippers and growers were suffering due to unfair practices on the part of commission merchants, dealers, and brokers. H.R. Rep. 1041, 71st Cong., 2d Sess. (1930).

2. Its primary purpose was to provide a practical remedy to small farmers and growers who were vulnerable to the sharp practices of financially irresponsible and unscrupulous brokers in perishable agricultural commodities. [7] *Chidesey vs Guerin*, 443 F.2d 584 (6th Cir. 1971); *O'Day vs George Arakelian Farms, Inc.*, 536 F.2d 856 (9th Cir. 1976). "Accordingly, certain conduct by commission merchants, dealers, or brokers (was) declared to be unlawful. 7 U.S.C. section 499b." *Id.* at 858.

3. Enforcement is effectuated through a system of licensing with penalties for violation. H. Rep. 1041, 71st Cong., 2d Sess. (1930) 3. See, also, *George Steinberg and Son, Inc. vs Butz*, 491 F.2d 988 (2d Cir.), *cert. den.*, 419 U.S. 830 (1974).

4. Section 2(4) of the PACA (7 U.S.C. 499b (4)) makes it unlawful, *inter alia* for any commission merchant, dealer, or broker [8] to fail to "make full payment promptly" of its obligations with regard to transactions involving perishable agricultural commodities made in interstate commerce. Insofar as is pertinent here, "full payment promptly" is defined by the Department (7 C.F.R. 46.2(aa)(1) and (5)) as requiring payment of the net proceeds for produce handled on consignment within 10 days after the last sales date and of the agreed purchase

[6] Complainant's exhibit 2.

[7] It has also been held that Congress intended, by enactment of the PACA, to establish bars to preclude all but financially responsible persons from engaging in the businesses subject to the PACA. *Zwick vs Freeman*, 373 F.2d 110, 117 (2d Cir.), *cert. den.*, 389 U.S. 835 (1967); *Marvin Tragash Co. vs United States Dept. of Agric*, 524 F.2d 1255, 1257 (5th Cir. 1975).

[8] These terms are defined in 7 U.S.C. 499a(5), (6) and (7).

prices for produce within 10 days after the day on which the produce is accepted.

5. The record establishes that respondent violated the PACA and the regulations by failing to make full and prompt payment of the net proceeds after consignment and the agreed purchase prices with respect to transactions involving perishable agricultural commodities, in interstate and foreign commerce, for a total of $908,131.57. The respondent, in effect, has admitted all of these violations (except for transactions 105-108; and 1-9 and 74-75, which complainant concedes do not constitute violations).

6. Respondent pursued only those alleged violations it considered would "responsibly connect" Anthony P. Levatino, its former president, director and a major stockholder, who purportedly resigned his offices, and transferred his stock to his spouse, March 31, 1983. [9]

7. Of those alleged violations, only transactions 105-108 remained relevant for reception of evidence at the hearing. Complainant made a prima facie case on them through the testimony of its investigator, respondent's pleadings, and invoices from respondent's records, all showing these transactions as unpaid obligations of respondent to A & D Christopher Ranch.

8. Mr. Levatino agrees that these obligations to Christopher were unpaid until September 29, 1983, because he was unable to get an earlier accounting from Christopher Ranch. Respondent and A & D Christopher Ranch had a open account arrangement wherein a certain line of transactions were left open until the end of the season, about late May or June. Mr. Levatino tried to settle with Christopher but Christopher delayed due to personnel changes slowing their bookkeeping.

9. However Levatino met briefly with a Christopher Ranch representative, on September 29, 1983, and signed an agreement acknowledging mutual obligations and partial satisfaction of them.

10. Levatino testified that he was hurried, harried, and paid little attention to "details" then, because the respondent, Roman Crest Fruit, had ceased business obligations. Levatino also cited the long, friendly relationship with Christopher Ranch which made it easier for him to sign the proposed agreement, even though he had insufficient time to examine it in detail.

11. The testimony of Levatino on this point is plausible, credible and persuasive that the account with Christopher Ranch was by mutual agreement and practice not settled until the end of the season and was delayed through no fault of Roman Crest Fruit on this occasion to September 29, 1983, for the outstanding mutual obligations.

[9] A person "responsibly connected" with a PACA licensee in violation of the Act will be barred from holding a PACA license and employment by a PACA licensee for various periods of years. 7 U.S.C. 499d, 499a(9)

12 The subject of this September 29, 1983, meeting was repeatedly explored and Levatino's testimony on this point was clear, consistent and persuasive. A supporting document to transaction 106 (page 9 of complainant's exhibit no. 1) shows "correction 9-29-83" noted on Christopher's invoice 23302, which tends to buttress this conclusion.

13 Thus, this record establishes, at a minimum, that the last transactions in dispute, 105-108, were not due and payable on or before March 31, 1983, the pivotal point here on the issues as framed by the parties

14 Complainant made a prima facie case on the transactions alleged in the complaint by way of testimony from complainant's investigator, pleadings filed by respondent in the bankruptcy court and invoices from respondent's open account files at the time the investigator was there

15 However, Mr Levatino's testimony clearly establishes that these [illegible] these four (4) transactions were not due and payable to [illegible] at least late September 1983 Mr Levatino's testi[illegible] and off-set the bankruptcy pleadings and [illegible] found invoices for these four (4) transac[illegible] records of respondent business

[illegible] that respondent must list all *possible* [illegible] respondent did this to ensure that [illegible] obligations Respondent's [illegible] the *possible* debts in the [illegible] them as debts [illegible]

[illegible] are corrected, the [illegible] are persuasive at [illegible] these four (4) trans[illegible]

[illegible] one hundred [illegible] section 2 of the FAC A [illegible] Agric Dec [illegible] More[illegible] respondent constitute fla[illegible] the PACA *American Fruit Purveyors* [illegible] F.2d [illegible] *cert denied,* [illegible] 32 Agric Dec 236 [illegible] *Inc*, vs *Butz,*

supra, 491 F2d.988. [10]

19. Since respondent has no license to suspend or revoke, it is not necessary to make a finding of willfulness. *G. Steinberg & Son, Inc., supra*, 32 Agric. Dec. 236, 262.

20. However, respondent's violations were willful. A violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by a statute or if a person carelessly disregards the requirements of a statute. *Henry S. Shatkin*, 34 Agric. Dec. 296 (1975); *G. Steinberg & Son, supra*. 32 Agric. Dec. 236, 263-269; *Goodman vs Benson*, 286 F.2d 896 (7th Cir. 1961). [11]

21. Respondent knew or should have known that it could not make prompt payment for the large amount of perishables it ordered; yet respondent continued to make purchases. Respondent was aware of the Act's requirements; yet it continued to buy knowing that each purchase could result in another violation.

22. Respondent should have made sure that it had sufficient capitalization with which to operate. It did not and, consequently, could not pay its suppliers. Under these circumstances, Roman Crest was clearly operated in careless disregard of the payment requirements of the PACA, and respondent's violations were, therefore, willful. *Atlantic Produce, supra*, 35 Agric. Dec. 1631, 1961; *Rudolph John Kafcsak*, 39 Agric. Dec. 683 (1980), *aff'd mem.*, 673 F.2d 1329 (6th Cir. 1981).

Sanction

1. Decisive factors to consider in setting a saction are: [12] the fact that respondent violated a fiduciary duty owed towards the four consignors; the number of violations; the seriousness of violations; the impact of violations on the industry as a whole; the need to maintain trust relationships within the industry—the basis for virtually every transaction in this multibillion dollar industry; and the financial status of respondent. Taking all these factors into consideration, the saction sought by complainant should be granted. *J. H. Norman & Sons Distributing Co.*,

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[10] See, also *Zwick vs Freeman*, 373 F.2d 110, 115 (2d Cir.) *cert. den.*, 389 U.S. 835 (1967); *Reese Sales Company vs Hardin*, 458 F.2d 183 (1972); *Atlantic Produce, supra*, 35 Agric. Dec. 1631; *J.H. Norman & Sons Distributing Co* , 37 Agic. Dec. 705, 709 (1978):

> Respondent's violations are malum prohibitum – not *malum in se*. Accordingly, there is no inconsistency between the finding that (respondent) conducted himself responsibly and honorably, and the finding that respondent's failure to pay over $48,000 for produce in 73 transactions and $200 in brokerage fees in 20 transactions constitutes repeated, flagrant and willful violations of the Act

[11] See also, *American Fruit Purveyors vs United States, supra*, 630 F.2d 370, at 374: "Under PACA, an action is willful if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements."

supra, 37 Agric. Dec. 705; *G. Steinberg & Son, supra*, 32 Agric. Dec. 236.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Complainant contends on appeal that there is no evidence to support the ALJ's findings and conclusions that Transactions 105–108 were not due and payable until late September 1983, and that they were fully paid as a result of offsetting transactions. However, Mr. Levatino testified that Transactions 105–108 were fully paid as early as July 1983. Specifically, he testified (Tr. 92):

> Q.Did Roman Crest, in fact, receive shipments of merchandise from Christopher, from May through July of 1983?
>
> A. Yes, we did.
>
> Q. And at the time that you received these shipments, were the invoices representing transactions 105 through 108 still open?
>
> A. No, they were paid.
>
> Q. Now, how were they paid, sir?
>
> A. We had shipped -- Roman Crest shipped a lot of fruit to Christopher during the Chilean season and there were some invoices to a customer on the West Coast by the name of Valley Brokerage of $42,700.00 and $43,000.00 that Valley Brokerage owed to Roman Crest for the purchase of fruit.
>
> I personally had instructed them to turn these checks over to A & D Christopher Ranch as payment against some of the invoices that Roman Crest owed to Christopher Ranch.

Furthermore, there is abundant testimony from Mr. Levatino that Transactions 105–108 were not due to be paid until late September 1983 (Tr. 85–176). Hence any failure to pay in full would have oc-

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[12] Among factors not considered was the effect of such a finding on those responsibly connected with the respondent corporation. Such a factor is not material or relevant to this proceeding. *Atlantic Produce, supra*, 35 Agric. Dec. 1631; *Marvin Tragash Co. vs United States Dept. of Agric.*, 524 F.2d 1255 (5th Cir. 1975). See, also, *J.H. Norman & Sons Distributing Co., supra*, 37 Agric. Dec. 705, 715:

> Unfortunately for (respondent), he chose to engage in business in the regulated agricultural marketing system, which is probably the only field in which inability to pay one's bills is unlawful (or even dishonorable).
>
> chaic; bankruptcy has lost its stigma; but the fail-
>
> nd vegetables in commerce is unlawful (7 U.S.C.

curred after the "pivotal" date of March 31, 1983. [13]

Complainant also argues on appeal that the ALJ erred in failing to grant complainant's petition to reopen the hearing filed January 17, 1986, after the hearing had been closed on December 30, 1985. However, no error was committed.

Complainant's attorney contends that (i) he was surprised at Mr. Levatino's testimony, which contradicted the payment terms set forth in the documentary evidence, and (ii) he did not know that Mr. Levatino's testimony was false until after he studied the transcript of the hearing and had an opportunity to discuss Mr. Levatino's testimony with officials of Christopher Ranch. However, neither contention is persuasive.

When the complaint was originally filed, involving 21 suppliers and 207 transactions, it would have been excusable for complainant's attorney to have been surprised by Mr. Levatino's testimony with respect to Transactions 105-108. But where, as here, prior to the holding of the hearing, the controversy was narrowed to one seller (Christopher Ranch) involving four transactions (Transactions 105-108), there is no excuse for not interviewing that seller in advance of the hearing, so that complainant's attorney would have been in a position to recognize instantly that Mr. Levatino's testimony was false (according to the Christopher Ranch official). Complainant could then have requested a continuance to procure rebuttal testimony. [14]

Once complainant allowed the hearing record to be closed, he is bound by the newly discovered evidence rule. As stated in *In re Spencer Livestock Comm'n Co.*, 46 Agric. Dec. ____, slip op. at 88b-88c (Mar. 19, 1987), which, in turn, is quoting from *In re King Meat Co.*, 40 Agric. Dec. 1910, 1910-11 (1981) (order denying reopening), *aff'd*, No. CV 81-6485 (Aug. 11, 1983), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished):

> Respondent concedes that the evidence it would adduce was in its possession at the time of the original hearing, but was not considered of importance at that time. The case is identical, in this respect, to *In re DeJong Packing Co.*, 36 Agric. Dec. 1319, 1319-20 (1977), *aff'd*, 618 F.2d 1329 (9th Cir.) (2-1 decision), *cert. denied*, 449 U.S. 1061 (1980), in which it is stated:
>
> > The rules of practice provide that a "petition to reopen a hearing to take further evidence may be filed at any time prior to the issuance of the final order" (9

[13] Whether Mr. Levatino was, in fact, no longer "responsibly connected" with respondent after March 31, 1983, is an issue to be determined before another forum.

[14] Since the issue is not involved in this case, no view is expressed (or implied) as to whether the ALJ should have granted a request for a continuance, if it had been made.

CFR 202.21(a)(2)). Since respondent Hygrade's petition was filed after the issuance of the final order, it comes too late and is, therefore, denied.

But even if the petition had been timely filed, it would have been denied. A timely filed petition to reopen the hearing must "set forth a good reason why such evidence was not adduced at the hearing" (9 CFR 202.21(a)(2)). This administrative requirement is similar to the judicial practice regarding newly discovered evidence (*see United States* v. *Bransen*, 142 F.2d 232, 235 (C.A. 9)). In that case it was held (*ibid.*):

> Subsequent discovery of the importance of evidence which was in the possession of applicant for new trial, at the time of the trial, does not entitle him to a new trial upon the ground of newly discovered evidence.

"Under this type of procedural rule, a proceeding will not be remanded if a party had full opportunity to present evidence at the original hearing, but failed to do so (*National Labor R. Board* v. *Weirton Steel Co.*, 135 F.2d 494, 497 (C.A. 3); *National Labor R. Board* v. *Aluminum Products Co.*, 120 F.2d 567, 573 (C.A. 7)." *In re Mountainside Butter & Egg Co.*, 38 Agric. Dec. 789, 795 (1978) (remand order), *final decision*, 39 Agric. Dec. 862 (1980), [*aff'd*, No. 80-3898 (D.N.J. June 23, 1982), *aff'd mem.*, 722 F.2d 733 (3d Cir. 1983), *cert. denied*, 104 S. Ct. 1417 (1984)]; *accord*, *In re Winger*, 38 Agric. Dec. 182, 188 (1979).

This principle is vital to the efficient handling of the Department's numerous regulatory cases. If a party were free to petition to reopen the hearing to take further evidence whenever it was discovered that additional evidence in the party's possession at the time of the original hearing would be helpful, it would completely disrupt the administrative process.

As stated above, there is no excuse for complainant's attorney not to have known of the existence of the evidence from the Christopher Ranch officials prior to the hearing. In addition, there is no reason why complainant's attorney should have been surprised when Mr. Levatino contradicted the documentary evidence. The documentary evidence, i.e., the four invoices relating to Transactions 105-108, state on their face that the payment terms are "NET 10 DAYS" (CX 1). Since respondent's answer denied that these transactions were a violation, and respondent requested a hearing on these four transactions, complainant's attorney should have expected Mr. Levatino to offer some defense to the transactions at the hearing. Accordingly, complainant's attorney should have had a Christopher Ranch witness available for rebuttal testimony.

I can sympathize with complainant's reluctance to inconvenience trade witnesses by making them travel across the country to attend a

hearing. Frequently, the individual who has firsthand knowledge of the transactions is a key figure, whose attendance is required in the daily conduct of the supplier's business. Nonetheless, as stated in *In re Hampshire Open Air-Mkt., Inc.*, 41 Agric. Dec. 955, 962-63 (1982), complainant should be prepared to prove its case by the testimony of at least two or three trade witnesses from firms handling a substantial number of transactions. "[E]ven if a few firms are inconvenienced, that is a necessary price that must be paid to attain the benefits of the regulatory program" (*id.* at 963).

For the foregoing reasons, the following order should be issued. [15]

Order

A finding is made that respondent has committed willful, flagrant and repeated violations of section 2 of the PACA (7 U.S.C. 499b), and the facts and circumstances set forth above shall be published.

This order shall become effective on the 30th day after service on respondent.

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[15] This is one of a group of cases that has been unreasonably delayed in the Office of the Judicial Officer. During 1985 and 1986, the workload of the Judicial Officer doubled. Because of budgetary constraints, an assistant was not obtained until November 2, 1986.

A. J. SALES COMPANY v. SEVEN SEAS TRADING CO., INC., a/t/a VALLEY VIEW FARMS.

PACA Docket No. 2-7025.

Decision and order issued April 10, 1987.

Modification of Contract—F.O.B.,Suitable Shipping Condition Rule —Transportation Sources and Condition.

In a f.o.b. sale of mixed produce by complainant to respondent it was concluded that evidence was insufficient to support the contention of respondent that the contract was modified after arrival of the produce to call for sale on an open basis. However, complainant admitted that the contract was modified to call for consignment of the spinach. It was also concluded that transportation time was excessive and that damage shown by inspection two days after arrival was insufficient to show that warranty of suitable shipping condition is not voided by abnormal transportation service and conditions. No basis was found on which to conclude that respondent's consignment sales of the spinach were negligent.

George S. Whitten, Presiding Officer.

Complainant, pro se

Respondent, pro se.

Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $4,119.48 in connection with the shipment in interstate commerce of one truckload of mixed vegetables and one partial load of spinach.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complaint. The answer, since it was not verified, is not in evidence.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified complaint is considered a part of the evidence in the case as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed on opening statement. Respondent did not file an answering statement. Neither parties filed a brief.

Findings of Fact

1. Complainant, A. J. Sales Company, is a corporation whose address is P.O. Box 7798, Orlando, Florida.

2. Respondent, Seven Seas Trading Company, Inc., is a corporation also trading as Valley View Farms, whose address is 119 Chrystie Street, New York, New York. At the time of the transactions involved herein, respondent was licensed under the Act.

3. On or about November 13, 1984, complainant sold to respondent mixed perishable produce on a F.O.B. basis as follows: 100 Eggplant Fancy at $6.95; 10 Yellow Squash Fancy C/N at $16.95; 100 Green Beans Hand-Pik at $14.95; 131 Green Pepper Large at $5.35; 11 Green Pepper Extra Large at $6.35; 103 Green Pepper Medium at $4.95; 50 Suntans Medium at $4.65; 15 Italian Eggplant at $4.35; 100 Cucumbers Supers at $15.00; 100 Cucumbers Selects at $11.00; 25 Cubanelle Peppers at $8.35; 10 Long Hot Peppers Bushel at $8.85; and 50 Leeks at $6.85; or a total for the load of $7,177.55. A truck secured by respondent loaded part of the produce at Homestead, Florida, on November 13, 1984, and then proceeded to Pompano Beach, Florida, Tampa, Florida, and Zelwood, Florida, to finish the load. The truck was delayed one day in Tampa because is arrived to late to make the scheduled pickup.

4. "The truck arrived in New York on November 17, 1984, and part of the produce thereon was Federally inspected on November 19, 1984, at 12:10 p.m., after the produce had been unloaded from the truck. An "ABRIDGED REPORT OF FRESH FRUIT AND VEGETABLE INSPECTION" showed temperatures ranging from 40 degrees to 44 degrees Fahrenheit and, in addition, stated as follows:

> Spinach, Plants, flat type with no distinguishing marks. *Applicant states* 100 crates. *Condition*: 4 to 12% Average 8% decay.
>
> Eggplant in carton - John Whitworth, Florida - *Applicant states:* 100 cartons. *Condition:* Average 2% damage by sunken areas. 1 to 4 eggplant per carton average 8% damage by brown discoloration. No decay.
>
> Cucumbers - PSRO BROS. FL *Applicant states:* 150 carton - *Condition: Super Select:* 10 to 16% average 13% damage by yellowing. *Select lot:* 12 to 20% average 16% damage by yellowing. Each no decay.
>
> Sweet Peppers - Fresh Vegetable - *Applicant states:* 245 carton. *Large:* 4 to 10% average 7% decay affecting walls and Calyxes. *Medium lot:* 4 to 9% average 6% decay affecting walls and Calyxes.
>
> *Spinach and Pepper lots:* Decay is Bacterial Soft Rot in Various Stages.

6. On or about November 14, 1984, complainant sold to respondent 100 bushels of spinach at $8.35 per bushel F.O.B., for a total of $835.00. The spinach was included along with 200 cartons of cucumbers and shipped to respondent in New York. This spinach is identical with the spinach covered by the Federal inspection quoted in Finding of Fact 5 above.

7. Following the Federal inspection on November 19, 1984, respondent contacted complainant by telephone and requested protection for the entire load shipped on November 13, and also for the spinach. Complainant refused to grant protection the November 13, load of mixed produce but did grant protection on the spinach. Respondent attempted to sell the spinach but the cartons sold were returned by the customers, and on November 27, 1984, 70 cartons of the spinach were Federally inspected and found to have an average of 85% bacterial soft rot in various stages. Respondent then dumped the spinach.

8. The formal complaint was filed on July 9, 1985, which was within 9 months after the cause of action herein accrued.

Conclusions

It is clear from the record herein that respondent accepted the truckload of mixed produce as well as the spinach and thus became liable to complainant for the full purchase price thereof. Respondent, however, contends that as to both the load of mixed produce and the spinach, complainant agreed to allow respondent to sell such produce on an open basis. In support of this contention respondent refers us to a Mailgram, included as a part of the Department's report of investigation and dated November 21, 1984, at 12:32 p.m., from respondent to complainant. Such Mailgram purports to confirm a November 19, 1984, conversation in which complainant is alleged to have agreed to the sale of the mixed vegetables on an open basis. However, complainant's Carl Boyles stated in the opening statement that the Mailgram was not picked up at their post office until Friday, November 23, and was not seen by him until Monday morning, November 26, 1984. The report of investigation also contains the reply Mailgram from complainant, dated November 26, 1984, at 10:18 a.m., which states that the November 21, 1984, Mailgram was in error and affirms that the November 19, 1984, conversation allowed only one item to be billed on an open basis, namely the spinach. We conclude from all of the evidence of record that a contract modification was made only relative to the spinach.

The inspection of a portion of the mixed produce at destination shows somewhat excessive damage due to yellowing in the cucumbers and excessive decay in the sweet peppers. The regulations (7 C.F.R. § 46.43(i) and (j)) provide that in a F.O.B. sale, the seller is obligated to place the produce free on board the transit facility at shipping point in suitable shipping condition and that the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed. Suitable shipping condition is defined by the regulations to mean that if the shipment is handled under normal transportation service and conditions, delivery will be assured without abnormal deterioration at the contract destination agreed upon between the par-

ties. It is clear, then, that for the warranty to be applicable, transportation service and conditions must be normal. Where a buyer accepts perishable produce, such buyer has the burden of proving that transportation service and conditions were normal. *Watson Distributing v. Fruit Unlimited, Inc.*, 42 Agric. Dec. 1613 (1983). In this case the record establishes that the produce left the initial shipping point on November 13, did not arrive at destination until November 17, and was not inspected until November 19. Complainant alleges that the produce was shipped on a truck which was arranged for by respondent, and incurred one day's delay in picking up produce at Tampa, Florida. Normal shipping time from Florida to New York should be approximately two days. If we allow an extra day for picking up the produce at the various scheduled loading points, there is still an extra one day's delay in transit and we conclude, therefore, that transportation service was not normal. However, the rule which cause abnormal transportation to void the warranty of suitable shipping condition is not applied in situations where the nature and extent of damage found at destination is such that the commodity would clearly have been abnormally deteriorated even if transportation service and conditions had been normal. See *Admiral Packing Company v. Sam Viviano & Sons*, 40 Agric. Dec. 1993 (1981).

The inspection at destination was made the second day following arrival. While this delay in inspection may not have been due to respondent's negligence, since the produce arrived on a Saturday, under the warranty of suitable shipping condition, we are constrained to look to condition at time of arrival. The federal inspection of the cucumbers showed an average of 13% damage by yellowing in one lot and 16% damage by yellowing in the other lot. The Federal grade standards (7 C.F.R. § 51.2220 et seq.) allow a tolerance at shipping point of 10% for all grades of cucumbers, including U.S. Fancy, in regard to damage such as yellowing. In this case, of course, we are looking at the cucumbers at destination and, in addition, the cucumbers were not sold under U.S. grade standards. The U.S. grade standards for sweet peppers allow a 3% tolerance for decay. The amount of decay in the subject sweet peppers was clearly excessive.

However, in view of the rapidity with which decay advances, and in view of the fact that a somewhat larger amount than 3% would be allowed for good delivery at destination, it becomes a very close question as to whether these peppers had excessive decay at time of delivery on the 17th. The amount of damage shown in the eggplants was within the tolerances specified under the U.S. grade standards (See 7 C.F.R. § 51.2194). We conclude that there is no reason in this case to invoke the exception mentioned above, and accordingly, the warranty of suitable shipping condition is not applicable. Since respondent accepted the truckload of produce, it is liable to complainant for the full pur

chase price thereof, or $7,177.55. Respondent has already paid complainant $3,893.07 of this amount, which leaves a balance still due and owing of $3,284.48. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

In regard to the spinach which was shipped and received during approximately the same time period, but on a separate truck, and included in the inspection made on November 19, complainant admits to a modification of the contract which it characterizes as a granting of "sales protection" and further states that respondent was to work "the spinach on a consignment basis." The inspection reveals that the spinach contained an average of 8% decay, and the Federal inspection of 70 crates of the spinach approximately one week later shows an average of 85% decay. Respondent maintains that it attempted to sell the spinach but that the cartons which it sold were returned by its customers. In view of the rapidity with which decay progresses in spinach, we are unable to conclude that respondent dealt with the spinach in a negligent manner in regard to its efforts to sell such spinach on consignment. Complainant has alleged that respondent's efforts were negligent but we do not believe that complainant has succeeded in proving such negligence by a preponderance of the evidence. We conclude that respondent is not liable to complainant for any amount in regard to the spinach.

Order

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $3,284.40, with interest thereon at the rate of 13% per annum from December 1, 1984, until paid.

Copies of this order shall be served upon the parties.

R. M. ALLRED AND RONALD ALLRED, d/b/a ALLRED'S PRODUCE, v. RICHARD C. SHELTON, d/b/a MID-VALLEY BROCKERAGE CO.

PACA Docket No. 2-6967.

Order filed April 7, 1987.

Andrew Y. Stanton, Presiding Officer.

Stephen P. McCarror, Silver Spring, Maryland, for complainant.

Respondent, pro se.

Order issued by Donald A. Campbell, Judicial Officer.

AMENDMENT TO ORDER

On February 18, 1987, an order was issued denying respondent's petition to reopen and dismissing respondent's petition for reconsidera-

tion, filed in connection with this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). This amendment of order is being issued to resolve any questions that might remain concerning that order, and to clarify the amount awarded and when it is to be paid.

The first matter to be discussed is the denial of the petition to reopen. We stated in the February 18, 1987, order that an extension of time had been given to respondent to permit him to submit a petition to reopen and for reconsideration of the November 25, 1986, decision and order, awarding reparation to complainant in the amount of $2,302.50 plus interest. That extension was necessary for the petition even to be accepted for filing as the petition was filed on January 9, 1987, 45 days after issuance of the decision and order. The decision and order specifically stated that the reparation awarded therein should be paid within 30 days from the date of such order. Without the extension of time, the Department would have lost jurisdiction at the expiration of this 30 day period. *Santo Tomas Produce Association v. Elizar Ozuna, et al.*, 39 Agic. Dec. 795 (1980). However, the granting of the extension of time did not signify that the document sought to be introduced was thereby accepted into evidence. It is clear from section 47.24(b) of the Rules of Practice that a petition to reopen may be filed at any time *prior* to the issuance of the final order (7 U.S.C. § 47.24(b)). Respondent's petition was filed 45 days *after* the final order of November 25, 1986, and must accordingly be denied.

Even if we were to consider the document respondent has sought to introduce, it would not alter our decision to dismiss the petition for reconsideration. The document in question is a shipping manifest issued by Rancho Vergeles, Inc., Donna, Texas, showing that 267 cartons of tomatoes were sold to complainant and shipped to Philadelphia, Pennsylvania. Respondent argued that the manifest showed that the 267 cartons received by Rancho Vergeles, Inc., for shipment to Philadelphia. However, the manifest does not show that respondent purchased the tomatoes from Rancho Vergeles, Inc., for resale to respondent and shipment to Kaleck Bros., as respondent never alleged that its contract with complainant specified where the tomatoes were to originate.

Respondent also alleged in his petition for reconsideration that complainant failed to make proper shipping arrangements. There is no need to decide this issue, as complainant's breach of duty in this regard would entitle respondent to recover provable damages, and the decision and order already determined that respondent has such an entitlement. However, the decision and order correctly decided that respondent failed to sustain his burden of proving damages.

The basis for the determination that respondent failed to prove damages was the finding made in the decision and order that Kaleck Bros.

was not the agreed upon destination at the time of contract was entered into. Therefore, the actual value of the tomatoes could not be arrived at by utilizing the results of resale by Kaleck Bros., as such resale was neither prompt nor proper, occurring four days after the tomatoes should have been delivered to respondent at his place of business, and 1,500 miles away from that location. This finding that Kaleck Bros., was not the contemplated destination at the time of sale was asserted by respondent in his sworn answer, "[t]here was never any mention of destination by respondent . . . ." Respondent restated this position in his sworn answering statement, asserting, "[n]othing was ever asked or said as to the destination of the tomatoes." Respondent claimed in his answering statement that he sent a confirmation to complainant on the same day the tomatoes were unloaded, January 28, 1985. This confirmation, which is in evidence, does not state the respondent sold the 267 cartons of tomatoes to Kaleck Bros. It also states thereon the findings of the January 28, 1985, inspection, indicating that respondent issued the confirmation after he was notified that the tomatoes had arrived at Kaleck Bros. in poor condition. The confirmation does not show that Kaleck Bros. was the contract destination agreed upon by the parties at the time of sale. The decision and order properly gave great weight to respondent's own sworn statements that there was no agreed upon destination at that time.

It is clear that there is no merit to respondent's petition to reopen and for reconsideration. Therefore, the February 18, 1987, order was correctly decided.

The November 25, 1986, decision and order is hereby reinstated, and the $2,302.50 plus interest awarded to complainant in that order shall be paid by respondent within 30 days from the date of this order.

Copies of this order shall be served upon the parties.

ERNIE DALADIO d/b/a ZAPATA SALES v. VIC MAHNS, INC.

PACA Docket No. 2-7416.

Order filed April 7, 1987.

Edward M. Silverstein, Presiding Officer.

Thomas R Oliveri, Newport Beach, California, for complainant.

Respondent, pro se.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT AND PARTIALLY DISMISSING COMPLAINT

This is a reparation proceeding pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*).

Complainant filed an informal complaint on February 25, 1986, against respondent concerning a transaction involving 480 cartons of cherry tomatoes which occurred on October 15, 1985. On April 7, 1986, the Department wrote the respondent a letter concerning this transaction. Apparently, the respondent did not respond to this letter. On May 2, 1986, the complainant filed a formal complaint concerning this transaction which, although served upon respondent by letter dated June 19, 1986, was, apparently, not answered. However, on November 7, 1986, complainant filed an amended complaint. The amended complaint not only dealt with the October 15, 1985, cause of action, but also concerned a cause of action arising on October 10, 1985, involving a shipment of green peppers. The filing of the amended complaint is the first time that the complainant had indicated that respondent might be obligated to it for the October 10, 1985, transaction.

Noting that the filing of the November 7, 1986, amended complaint took place more than nine months after the complainant's cause of action regarding the October 10, 1985, transaction arose, depriving the Secretary of jurisdiction over it, the presiding officer asked the complainant to show cause why its complaint should not be dismissed with regard to it. In response to the show order, the complainant stated that the January 10, 1986, check which the respondent had issued in payment for the transaction was returned because of a "stale date" after complainant had attempted to negotiate it in September 1986. The file does not reflect why the complainant held the check for eight months before attempting to negotiate it, nor does it indicate whether the complainant had requested that respondent issue a replacement check after the January 10, 1986, check failed to clear banking channels in September 1986. Moreover, the record indicates that the respondent does not dispute owing complainant the $886.50 involved in this transaction. Under these circumstances, the complainant has failed to allege any facts by which we could conclude that the respondent committed a violation of section 2 of the Act with regard to this transaction. Moreover, even had the complainant alleged such facts as would warrant such a conclusion, as its amended complaint was filed more than nine months after the October 10, 1985, cause of action accrued, we would not have jurisdiction over the matter. *See* 7 U.S.C. 499f. Accordingly, the complaint as to the October 10, 1985, transaction is dismissed. That we dismiss the complaint on these grounds does not, of course, mean that the respondent's obligation to pay complainant for the green peppers is terminated. Rather, it means that, should the respondent not pay its obligation, the complainant needs to seek relief in another form.

With regard to the October 15, 1985, transaction, the complainant seeks payment of $2,400.00 from respondent. Respondent has filed an answer admitting liability to the complainant in the amount of

$1,080.00 with regard to this shipment of tomatoes in interstate commerce.

Section 7 (a) of the Act (7 U.S.C. 499g(a)) provides in part:

> If after the respondent has filed his answer to the complaint, it appears that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Secretary . . . may issue an order directing the respondent to pay the complainant the undisputed amount . . . leaving the respondent's liability for the disputed amount for subsequent determination.

Accordingly, under the authority of the above quoted section, respondent shall pay to complainant, as an undisputed amount, $1,080.00. Payment of this amount shall be made within 30 days from the date of this order with interest thereon at the rate of 13 percent per annum from November 1, 1985, until paid. A failure to pay this amount within 30 days will constitute a violation of section 2 of the Act. 7 U.S.C. 499b.

Respondent's liability for payment of the disputed amount is left for subsequent determination in the same manner and under the same procedure as if no order for the payment of the undisputed amount had been issued.

Copies of this order shall be served upon the parties.

MACK DEMPSEY CO. v. SCOTT FINKS CO., INC.

PACA Docket No. 2-7415.

Order issued April 14, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $13,070.94, in connection with 15 truckloads of potatoes or onions, each being a perishable agricultural commodity. The respondent has filed an answer denying any liability to complainant because of amounts owed to it by complainant in connection with other transactions. These other transactions are the subjects of other proceedings pending before us, to wit: PACA DOCKET Nos. 2-7066, 2-7105, and 2-7223. It should be noted that the total amount involved in these three cases is $30,791.32.

The Department recently received notification that the complainant in the instant action had filed a petition in bankruptcy. In view of the

filing of that petition, the cases referred to above in which it was the respondent, but not necessarily the instant case in which it is complainant, are automatically stayed by virtue of 11 U.S.C. § 362. Such a circumstance might have resulted in an unjust situation.

In view op the above, ;the presiding officer suggested to the parties that all four cases be dismissed and that the disputes between the parties be resolved in the Bankruptcy Court. The suggestion was made in a letter, dated February 25, 1987, in which the parties were given ten days to object to such action being taken. Neither party objected thereto. Accordingly, the complaint is dismissed.

Order

The complaint is dismissed.

Copies of this order shall be served upon the parties.

SCOTT FINKS COMPANY, INC. V. MACK C. DEMPSEY d/b/a MACK C. DEMPSEY CO.

PACA Docket No. 2-7066.

Order filed April 14, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $20,661.00, in connection with five truckloads of mixed vegetables, each being a perishable agricultural commodity. It is noted that complainant has two other proceedings pending before us against the respondent, to wit: PACA Docket Nos. 2-7105 and 2-7223, and that the total amount involved in the three cases is $30,791.32. It also should be noted that the respondent has a reparation complaint pending against the complainant alleging an indebtedness of $13,070.94 in connection with 15 transactions involving potatoes and onions, to wit, PACA Docket No. 2-7415.

The Department recently received notification that the respondent in the instant action had filed a petition in bankruptcy. In view of the filing of that petition, the cases referred to above in which it is the respondent, including the instant matter, but not necessarily the case in which it is the complainant, are automatically stayed by virtue of 11 U.S.C. § 362. Such a circumstance might have resulted in an unjust situation.

In view of the above, the presiding officer suggested to the parties that all four cases be dismissed and that the disputes between the parties be resolved in the Bankruptcy Court. The suggestion was made in

$1,080.00 with regard to this shipment of tomatoes in interstate commerce.

Section 7 (a) of the Act (7 U.S.C. 499g(a)) provides in part:

> If after the respondent has filed his answer to the complaint, it appears that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Secretary . . . may issue an order directing the respondent to pay the complainant the undisputed amount . . . leaving the respondent's liability for the disputed amount for subsequent determination.

Accordingly, under the authority of the above quoted section, respondent shall pay to complainant, as an undisputed amount, $1,080.00. Payment of this amount shall be made within 30 days from the date of this order with interest thereon at the rate of 13 percent per annum from November 1, 1985, until paid. A failure to pay this amount within 30 days will constitute a violation of section 2 of the Act. 7 U.S.C. 499b.

Respondent's liability for payment of the disputed amount is left for subsequent determination in the same manner and under the same procedure as if no order for the payment of the undisputed amount had been issued.

Copies of this order shall be served upon the parties.

MACK DEMPSEY CO. v. SCOTT FINKS CO., INC.

PACA Docket No. 2-7415.

Order issued April 14, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $13,070.94, in connection with 15 truckloads of potatoes or onions, each being a perishable agricultural commodity. The respondent has filed an answer denying any liability to complainant because of amounts owed to it by complainant in connection with other transactions. These other transactions are the subjects of other proceedings pending before us, to wit: PACA DOCKET Nos. 2-7066, 2-7105, and 2-7223. It should be noted that the total amount involved in these three cases is $30,791.32.

The Department recently received notification that the complainant in the instant action had filed a petition in bankruptcy. In view of the

filing of that petition, the cases referred to above in which it was the respondent, but not necessarily the instant case in which it is complainant, are automatically stayed by virtue of 11 U.S.C. § 362. Such a circumstance might have resulted in an unjust situation.

In view op the above, ;the presiding officer suggested to the parties that all four cases be dismissed and that the disputes between the parties be resolved in the Bankruptcy Court. The suggestion was made in a letter, dated February 25, 1987, in which the parties were given ten days to object to such action being taken. Neither party objected thereto. Accordingly, the complaint is dismissed.

Order

The complaint is dismissed.

Copies of this order shall be served upon the parties.

SCOTT FINKS COMPANY, INC. V. MACK C. DEMPSEY d/b/a MACK C. DEMPSEY CO.

PACA Docket No. 2-7066.

Order filed April 14, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $20,661.00, in connection with five truckloads of mixed vegetables, each being a perishable agricultural commodity. It is noted that complainant has two other proceedings pending before us against the respondent, to wit: PACA Docket Nos. 2-7105 and 2-7223, and that the total amount involved in the three cases is $30,791.32. It also should be noted that the respondent has a reparation complaint pending against the complainant alleging an indebtedness of $13,070.94 in connection with 15 transactions involving potatoes and onions, to wit, PACA Docket No. 2-7415.

The Department recently received notification that the respondent in the instant action had filed a petition in bankruptcy. In view of the filing of that petition, the cases referred to above in which it is the respondent, including the instant matter, but not necessarily the case in which it is the complainant, are automatically stayed by virtue of 11 U.S.C. § 362. Such a circumstance might have resulted in an unjust situation.

In view of the above, the presiding officer suggested to the parties that all four cases be dismissed and that the disputes between the parties be resolved in the Bankruptcy Court. The suggestion was made in

a letter, dated February 25, 1987, in which the parties were given ten days to object to such action being taken. Neither party objected thereto. Accordingly, the complaint is dismissed.

ORDER

The complaint is dismissed.

Copies of this order shall be served upon the parties.

SCOTT FINKS COMPANY, INC. v. MACK C. DEMPSEY d/b/a MACK C. DEMPSEY CO.

PACA Docket No. 2-7105.

Order filed April 14, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $6,109.07, in connection with a truckload of potatoes, a perishable agricultural commodity. The respondent has filed an answer denying any liability to complainant. It is noted that complainant has two other proceedings pending before us against the respondent, to wit: PACA Docket Nos. 2-7066 and 2-7223, and that the total amount involved in the three cases is $30,791.32. It also should be noted that the respondent has a reparation complaint pending against the complainant alleging an indebtedness of $13,070.94 in connection with 15 transactions involving potatoes and onions, to wit, PACA Docket No. 2-7415.

The Department recently received notification that the respondent in the instant action had filed a petition in bankruptcy. In view of the filing of that petition, the cases referred to above in which it is the respondent, including the instant matter, but not necessarily the case in which it is the complainant, are automatically stayed by virtue of 11 U.S.C. § 362. Such a circumstance might have resulted in an unjust situation.

In view of the above, the presiding officer suggested to the parties that all four cases be dismissed and that the disputes between the parties be resolved in the Bankruptcy Court. The suggestion was made in a letter, dated February 25, 1987, in which the parties were given ten days to object to such action being taken. Neither party objected thereto. Accordingly, the complaint is dismissed.

ORDER

The complaint is dismissed.
Copies of this order shall be served upon the parties.

SCOTT FINKS COMPANY, INC. v. MACK C. DEMPSEY d/b/a MACK C. DEMPSEY CO.

PACA Docket No. 2-7223.

Order filed April 14, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding unc
Commodities Act, 1930, as amended
timely complaint was filed in which
against respondent in the amount of $4,
truckloads of potatoes, a perishable ag
spondent has filed an answer denying ar
noted that complainant has two other
against the respondent, to wit: PAC
2-7105, and that the total amount i
$30,791.32. It also should be noted tha
tion complaint pending against the com
ness of $13,070.94 in connection with
toes and onions, to wit, PACA Docket

The Department recently received not
the instant action had filed a petition i
filing of that petition, the cases referre
respondent, including the instant matter,
which it is the complainant, are autom
U.S.C. § 362. Such a circumstance mi
situation.

In view of the above, the presiding o
that all four cases be dismissed and that
ties be resolved in the Bankruptcy Court
a letter, dated February 25, 1987, in wh
days to object to such action being tal
thereto. Accordingly, the complaint is c

Order

The complaint is dismissed.
Copies of this order shall be served u

FIVE STAR PRODUCE, INC. v. EAGLES THREE, INC. a/t/a TRADEMARK PRODUCE & SALES.

PACA Docket No. 2-7049.

Decision issued April 7, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER ON RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended 97 U.S.C. 499a *et seq.*), a Decision and Order was issued on March 12, 1987, dismissing the complaint. On March 18, 1987, the complainant filed a "Motion for Reconsideration" in which it alleged as grounds in support thereof that we failed to give due consideration to its allegation that the respondent failed to perform its duty as a broker in that it failed to properly inform complainant as to the identity of the purchaser of the subject potatoes.

Complainant's motion raises no contentions or issues which were not raised and fully considered in our order of March 12, 1987. In our opinion, the March 12, 1987, Decision and Order is supported by the evidence and the law applicable thereto. Accordingly, complainant's "Motion for Reconsideration" is denied without prior service on respondent.

The Order of March 12, 1987, is reinstated.

Copies of this order shall be served upon the parties.

GREG ORCHARDS & PRODUCE, INC. v. B. G. MARKETING COMPANY

PACA Docket No. 2-7344

Decision and order filed April 29, 1987.

Assignment for benefit of creditors—Failure to pay.

Where complainant alleging failure to pay for produce contains invoices and bills of lading showing respondent received the produce, complainant has established a prima facie case and is entitled to reparation award where respondent's only defense is that it made an assignment of assets for the benefit of creditors under state law. Such assignments do not bar the reparations proceeding.

Peter V. Train, presiding officer.

Complainant, pro se.

Roger Schlossberg, Hagerstown, Maryland, for respondent.

Decision issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant sought award of reparation in the amount of $9,168.00 in connection with the sale of 3 trucklots of apples in interstate commerce.

Copies of the report of investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent. On October 8, 1986, respondent's assignee filed what it styled "Answer to Complaint and Suggestion of Insolvency" in which the assignee asserted that respondent made a general assignment of all its assets to him and that he had no particular knowledge of the facts alleged in the complaint and therefore could neither admit nor deny the allegations of the complaint. The assignee also moved that this reparation proceeding be stayed pending a final accounting and distribution of respondent's assets. Respondent's motion was denied on November 7, 1986, on the basis that there is no provision in Maryland state law or federal law requiring that federal administrative proceedings be stayed because of the filing of an assignment for the benefit of creditors.

Since the amount claimed in damages does not exceed $15,000.00, the shortened procedure provided in Section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) applies. Under this procedure, the verified complaint of the complainant as well as the Department's report of investigation are part of the evidence in the case. Respondent's answer, because it was unverified, is not part of the evidence. Additionally, both parties were given the opportunity to file evidence in form of verified statements. Neither party did so. Neither party filed a brief

Findings of Fact

1. Complainant Greg Orchards & Produce, Inc., is a corporation whose post office address is 4949 N. Branch Road, Benton Harbor, Michigan 49022.

2. Respondent B.G. Marketing Company is a corporation whose address is P. O. Box 649, Hagerstown, Maryland 21741. At the time of the transactions involved herein, respondent was licensed under the Act.

3. Between February 18, 1986, and March 19, 1986, complainant sold 3 trucklots of apples in interstate commerce to respondent in the total amount of $9,168.00.

4. Respondent received and accepted the produce, but has paid nothing with respect to any of the transactions.

5. The complaint was filed on August 28, 1986, which was within nine months of the time the causes of action herein arose.

Conclusions

Complainant has made a prima facie showing in this case that it shipped the apples in question at a total invoice price of $9,168.00. (Complainant's Exhibits 1-3 to the complaint) Respondent's only defense was that it filed an assignment for the benefit of creditors under Maryland law.

Such assignments, however, do not provide a defense in reparation proceedings. *Arbittier Farms v. Top Banana Farmers Market, Inc.*, 42 Agric. Dec. 1272 (1983); *Fruit Salad, Inc. v. M. Egan Co., Inc.*, 42 Agric. Dec. 664 (1983). They do not cut off the rights of parties to proceed before the Secretary in reparation proceedings. Furthermore, a reparation order has effects not attendant to any other proceeding. For example, failure to pay a reparation award results in sanctions against licensees, and those individuals responsibly connected with corporate licensees. *See*, 7 U.S.C. §§ 499g, h.

There is no indication in the record that respondent did other than accept three shipments of apples in interstate commerce. Nor is there any evidence that there has been any payment to complainant by respondent or respondent's assignee. Respondent is therefore liable to complainant for the full purchase price of the apples, or $9,168.00. The failure of respondent to pay this amount to complainant is a violation of section 2 of the Act for which reparation should be awarded to the complainant with interest.

Order

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $9,168.00, with interest thereon at the rate of 13 percent per annum from May 1, 1986, until paid.

Copies hereof shall be served upon the parties.

HOMESTEAD TOMATO PACKING CO., INC. v. TERRIFIC TOMATO BROKERS, INC. a/t/a TERRIFIC TOMATOES

PACA Docket No. 2-6981

Decision and order filed

State administrative proceeding—Contract price.

Respondent's motion to dismiss is denied, as State Administrative proceeding is not a court action, and therefore can be maintained while reparation proceeding taking place. Agreed upon contract terms held to be the average market price for the week. Respondent is liable for the difference between this price and the amount remitted.

Andrew Y. Stanton, presiding officer.

Complainant, pro se.

Stephen P. McCarron, Silver Spring, Maryland, for respondent.

Decision issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $8,000.00 in connection with the sale of 1,600 cartons of tomatoes to respondent, in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered part of the evidence, as are the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of verified statements and file briefs. Complainant submitted an opening statement. Respondent elected not to submit additional evidence. Neither party filed a brief.

Findings of Fact

1. Complainant, Homestead Tomato Packing Co., Inc., is a corporation whose address is P. O. Box 3064, Florida City, Florida.

2. Respondent, Terrific Tomato Brokers, Inc. a/t/a Terrific Tomatoes, is a corporation whose address 11459 Little Bear Drive, Boca Raton, Florida. At the time of the transaction alleged herein, respondent was licensed under the Act.

3. On approximately January 8, 1985, complainant sold to respondent one truckload of 546 tomatoes, 85 percent or better U. S. number one, f.o.b. The contract was negotiated by Tom Banks, a saksman of complainant, and Broderick Bolton, president of respondent. Complainant contemplated the eventual movement of the tomatoes in the course of interstate commerce. The parties agreed that the contract price would not be set until the week of January 21, 1985.

4. Complainant placed respondent's 1,600 cartons of 5 x 6 tomatoes in its gas room. Respondent pulled the tomatoes on January 23, 1985, and had them shipped to its place of business, where they were accepted. The parties agreed that respondent was to be charged $.50 per carton for gas and $.15 per carton for pallets.

5. According to the Federal-State Market News Service Reports for Winter Park, Florida, 5 x 6 tomatoes, 85 percent or better U.S. number one, had a shipping point price of $10.00 per carton on January 21, 1985, and $20.00 per carton on January 24, and 25, 1985. No prices are shown for January 22 and 23, 1985.

6. Respondent has paid complainant $25,040.00 for the tomatoes at issue, which has been accepted as partial payment of the $33,040.00 which complainant claims to be past due and owing.

7. A formal complaint was filed on August 7, 1985, which was within nine months from when the cause of action herein accrued.

Conclusions

Prior to reaching the merits of this case, we must first deal with a procedural issue raised by respondent. Respondent claims that complainant has instituted proceedings before the State of Florida Department of Agriculture and Consumer Services, seeking recovery of its claim addressed in this reparation action, based on a performance bond which respondent was required to file with the State. Respondent alleges that these concurrent actions violate section 5(b) of the Act (7 U.S.C. 499e(b)), and the reparation complaint must, therefore, be dismissed. Respondent has filed a letter form the appropriate Florida official, indicating that the State proceeding will be held in abeyance until the resolution of this reparation action.

We will not dismiss the complaint in this case. Section 5 of the Act reads as follows, in relevant part:

> a). If any commission merchant, dealer, or broker violates any provision of Section 2 of this Act he shall be liable to the persons or persons injured thereby for the full amount of damages sustained in consequence of such violations.
>
> b). Such liability may be enforced either (1) by complaint to the Secretary as hereinafter provided, or (2) by suit in any court of competent jurisdiction; but this section shall not in any way abridge or alter the remedies now existing at common law or by statute, and the provisions of this Act are in addition to such remedies

The Florida proceeding is before an administrative agency, and not a court, as contemplated by section 5(b) of the Act. Therefore, the Act does not prohibit the maintenance of these two proceedings.

Turning to the merits of the case, the issue in dispute concerns the contract price of the tomatoes. Complainant's president, Rosario Strano, asserts in the complaint that the agreed upon price was the market price on January 23, 1985, the date respondent pulled the tomatoes from complainant's gas room, which price Mr. Strano contends was $20.00 per carton. Mr Strano's assertions cannot be given any significant weight, as he admits in the complaint that contract negotiations were handled by his employee, Tom Banks, and respondent's president, Brod Bolton. Mr. Banks contends, in complainant's opening statement, that on January 18, 1985, he and Mr. Bolton agreed that the contract price would be set the week of January 21, 1985. Mr. Bolton has made inconsistent contentions regarding this issue, stating in the answer that the price was to be based on the market price for Mon-

day, January 21, 1985, and asserting in a February 15, 1985, letter to the Department that the contract price was to be at whatever point the market settled. After evaluating the evidence, it is our view that the statement of Mr. Banks is the only one deserving of credibility. Therefore, to determine the contract price, we will apply the average market price for the commodity involved, 1,600 cartons of 5 x 6 tomatoes, 85 percent U.S. number one or better, during the week of January 21, 1985.

The Federal-State Market News Service Reports for Winter-Park, Florida, the market closest to complainant's place of business, shows a shipping point price for 5 x 6 tomatoes, 85 percent U.S. number one or better, only on January 21, 1985, at $10.00 per carton, and January 24 and 25, 1985, at $20.00 per carton. Adding to this figure $.50 per carton for gas and $.15 per carton for pallets results in an average price for the week of $17.32 per carton, or $27,712.00 for the 1,600 carton load.

Respondent has paid $25,040.00 and is therefore liable for an additional $2,672.00. Respondent's failure to pay this sum to complainant is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

Order

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $2,672.00, with interest thereon at the rate of 13 percent per annum from March 1, 1985, until paid.

Copies of this order shall be served upon the parties.

HOMESTEAD TOMATO PACKING CO., INC. v. TRAY-WRAP, INC.

PACA Docket No. 2-7011

Decision and order filed April 2, 1987.

Burden of proving breach and damages—Express warranty as to grade—Suitable shipping condition warranty—F.O.B. transaction defined—Damages from breach of warranty.

Respondent sustained its burden of proving a breach of express warranty by complainant due to the grade defects affecting the tomatoes upon delivery. Respondent failed to sustain its burden of proving a breach of suitable shipping condition warranty because adnormal transportation conditions voided such warranty. Damages awarded based on percentage of grade defects in excess of permissable maximum under the contract terms. Complainant awarded difference between damages and contract price less amount already paid.

Andrew Y. Stanton, presiding officer.

Complainant, pro se.

Linda Strupf, Bronx, New York, for respondent.

Decision issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C § 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $3,763.20 in connection with the sale of a load of tomatoes to respondent in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered part of the evidence, as are the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs. Accordingly, complainant submitted an opening statement and respondent submitted an answering statement. Respondent also filed a brief.

Findings of Fact

1. Complainant, Homestead Tomato Packing Co., Inc., is a corporation whose address is P. O. Box 3064, Florida City, Florida.

2. Respondent, Tray-Wrap, Inc., is a corporation whose address is 266 N.Y.C., Terminal Market, Bronx, New York. At the time of the transaction involved herein, respondent was licensed under the Act.

3. In approximately January 2, 1985, complainant sold to respondent a quantity of tomatoes consisting of 960 cartons of 4 x 6 tomatoes at [illegible] and 640 cartons of 6 x 6 tomatoes at $5.00 per

etizing and $22.50 for a Ryan re-
of $10,662.50, f.o.b. It was agreed
at U.S. number one. The contract
alesman, Tom Banks, and respon-
mi, Florida.
ent had the 1,600 cartons of toma-
ring license number RDSZ-540182
Gasing Service, where they were
gh January 5, 1985. The tomatoes
ommerce to respondent's place of
re they arrived on January 8, 1985.
oad, charged $1,700.00 for freight.

5. Upon arrival of the tomatoes, respondent had them unloaded and federally inspected at 10:30 a.m. on January 8, 1985, which revealed as follows, in relevant part:

INSPECTION LOCATION	Applicants warehouse
INITIAL AND NUMBER	RDSZ 504182
TEMPERATURES	Range 62 to 64-F
APPLICANT	TrayWrap Inc.
APPLICANT STATES	1,600 cartons
PRODUCT:	Florida TOMATOES "STRANO'S" PRIDE 6 x 6 or 5 x 6 Federal State Inspected 903 139, 4"
SIZE:	Meets Florida Tomato Marketing Order size requirements as marked.
QUALITY AND CONDITION:	Grade defects range 12 to 29% average 21% damage including 20% serious damage, by misshapen, mechanical damage, insect damage and catfaces.
	Average approximately 20% green and breakers, 40% turning and pink, 35% light red and red. Average 1% soft. No decay in most carton, 1 to 11% in many, average 3% Buckeye Rot and/or Sour Rot various stages. Generally 4 to 16%, none in few cartons, average 9% damage by sunken, discolored areas
GRADE:	Now approximately 65% U.S. No. 1 quality, 3% decay irregular.

6. On January 8 and 9, 1985, respondent repacked the tomatoes, discarding 432 cartons of 5 x 6 tomatoes, and 256 cartons of 6 x 6 tomatoes.

7. Respondent has paid complainant $6,899.30 for the tomatoes, which is $3,763.20 less than the contract price of $10,662.50.

8. A formal complaint was filed on August 5, 1985, which was within nine months from when the cause of action herein accrued.

Conclusions

Respondent denies liability, claiming that tomatoes were in breach of warranty because they were out of grade, and in poor condition upon arrival at its place of business. Complainant insists that its tomatoes complied with the contract terms.

Respondent admittedly received and accepted the tomatoes in this f.o.b. transaction and, therefore, became liable for the contract price, less damages resulting from any breach of warranty by complainant. Respondent bears the burden of proving the breach and damages by a preponderance of the evidence. *Sun World International, Inc. a/t/a/ Sun World v. S&K Farms Inc.*, 42 Agric. Dec. 1228 (1983).

It is agreed that the terms of the contract provided that the grade of the tomatoes was to be 85 percent U.S. number one. This means that complainant expressly warranted that the tomatoes would be 85 percent U.S. number one at shipping point. *Co-Operative Growers' Association, Inc., v. W. W. Shipman & Son*, 34 Agric. Dec. 521 (1975). The January 8, 1985, inspection at respondent's place of business (Finding of Fact 5) shows that the tomatoes were then only 65 percent U.S. number one, due to grade defects and condition problems. Condition problems at destination cannot be presumed to have been present at shipping point, as they may be affected by conditions during transit. However, quality factors determinative of grade are permanent in nature and do not change in transit. *Co-Operative Growers' Association, Inc., v. W. W. Shipman & Son, supra*. Therefore, the grade defects revealed by the inspection, totaling 21 percent, must have been present at shipping point, and to the extent they exceed the 15 percent permitted under the contract, constituted a breach of complainant's express warranty.

Complainant argues that it had inspections taken at shipping point, which show clearly that the tomatoes were 85 percent U.S. number one. However, there is nothing contained on the two inspection certificates submitted by complainant which definitely identifies the tomatoes as those shipped to respondent. The shipping point inspection certificates contain in the box headed "Car trailer or truck no." The words "Common Carrier" rather than the license number of the trailer that actually shipped the tomatoes. One certificate is stamped "Insp. no. 903. House no. 139, Date L, B" and the other " Insp. no. 903, House no. 139, date B," which differs from the identification numbers of "903,139,4," as reported by the January 8, 1985, destination inspection. The shipping point inspection certificates cannot therefore be given significant weight. Even if they were considered to apply to the same tomatoes shipped to respondent, we would nonetheless give more weight to the destination inspection, as it is more detailed and, presumably, more accurate.

We next consider respondent's allegation that the condition of the tomatoes as revealed by the January 8, 1985, inspection demonstrated a breach of complainant's suitable shipping condition warranty. According to the regulations (7 C.F.R § 46.43(j)), suitable shipping condition means "that the commodity, at the time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties." Complainant argues that transportation conditions were not normal, as it takes no longer than 30 hours to drive from complainant's place of business in Florida City, Florida to respondent in Bronx, New York,

and the inspection did not take place until six days after shipment. Complainant is correct. Respondent's claim that the tomatoes were gassed from January 2 through January 5, 1985, and therefore, the inspection occurred only three days after shipment ignores the fact that the tomatoes left the shipping point on January 2, 1985. The regulations provide (7 C.F.R. § 46.43(i)) that in an f.o.b. sale such as this, it is the seller's obligation only to place the produce free on board the agency of transportation at the shipping point, in suitable shipping condition. It is the buyer who assumes all risk of damage or delay in transit not caused by the seller. *Admiral Packing Company v. Sam Viviano & Sons.*, 40 Agric. Dec. 1993 (1981). Therefore, complainant fulfilled its contractual obligation by turning over the 1,600 cartons of tomatoes allegedly in suitable shipping condition, to respondent on January 2, 1985. As previously stated, it is respondent's burden to prove a breach of warranty. Respondent also must prove the existence of normal transportation conditions. Respondent's action in having the tomatoes treated with gas for three days prior to shipment to New York must be considered in determining whether normal transportation existed. A six day period between the time the tomatoes left the shipping point on January 2, 1985, and when they arrived in New York on January 8, 1985, is at least three days too long. Respondent has failed to prove that this delay did not adversely affect the tomatoes. Therefore, we conclude that there were abnormal transportation conditions present here which voided the warranty of suitable shipping condition.

We have determined that complainant breached its express warranty as to the grade of the tomatoes, as grade defects present at the January 8, 1985, inspection exceeded the allowable maximum by six percent. As damages resulting from the breach, respondent is entitled to claim the difference between the value of the tomatoes, if they had complied with the express warranty, and their actual value. *Rogelio C. Sardina d/b/a Sardinas Farms v. Caamano Bros., Inc.,*, 42 Agric. Dec. 1275 (1983). For the value of the tomatoes if they had been as warranted, we would ordinarily look to the contract price plus freight of the load of produce. However, in this case, even if the tomatoes had complied with the terms of complainant's express warranty as to grade, their value would not have equaled the contract price plus freight, as the overall value of the tomatoes would have been diminished by the condition defects which we have concluded did not derive from complainant's breach of warranty. We can attempt to determine the value of the tomatoes if they had complied with the express warranty by deducting from the contract price the amount of loss caused by these condition defects. Since respondent acts as a repacker only, it cannot provide a resale accounting, and the amount of loss incurred on a load can only be calculated based on respondent's pack-out records. However, these records, which show a loss of 432 cartons of 5 x 6 tomatoes, and

256 cartons of 6 x 6 tomatoes, do not differentiate between losses resulting from grade damage, which is complainant's responsibility, and condition damage, which in this case is the responsibility of respondent. We therefore conclude that the only equitable measure of damages is to presume that the portion of the 21 percent average grade defects found by the January 8, 1985, inspection which exceeded the 15 percent permissible under the terms of the contract, or six percent, resulted in a total loss of six percent of the load. This is a proper measure of damages in cases such as this. *Roger Harloff Packing, Inc. v. Farm Fresh Produce, Inc.*, 42 Agric. Dec. 1260 (1983). If the 1,600 cartons had been in perfect condition when they arrived in New York, the value of the tomatoes would have been the contract price of $10,662.50 plus freight, which respondent has shown was $1,700.00 (Finding of Fact 4), for a total of $12,362.50. Therefore, respondent's damages are six percent of this figure, or $741.75.

We have found that respondent incurred damages due to complainant's breach of its express warranty of 741.75 which, deducted from the contract price of $10,662.50, leaves $9,920.75. Respondent has paid complainant $6,899.30 for the tomatoes and therefore owes an additional $3,021.45. Respondent's failure to pay this sum to complainant is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

Order

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $3,021.45, with interest thereon at the rate of 13 percent per annum from March 1, 1985, until paid.

Copies of this order shall be served upon the parties.

HUNT OIL COMPANY a/k/a PLANTATION PRODUCE COMPANY
RIBUTING, INC. ,

2-7100

filed April 29, 1987.

—Wrongful rejection—Buyer's duties regarding roduce—Damages awarded.

mes meeting contract specifications, buyer wrongfully re-
s were not U.S. #1 grade. Even if limes could have been
r became subject to damages when he violated duties by re-
nspection over seller's protest and by sending shipment out

iding officer.

Respondent, pro se.

Decision issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter "the Act." A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $2,716.20 in connection with the sale and shipment of a trucklot of limes in interstate commerce.

A copy the report of investigation prepared by the Department was served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer denying liability.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered to be part of the evidence, as are the verified complaint and answer. The parties were given opportunities to submit additional evidence in the form of verified statements and to file briefs. Both complainant and respondent submitted verified statements, but neither party submitted a brief.

Findings of Fact

1. Complainant, Hunt Oil Company a/k/a Plantation Produce Company (hereinafter "Plantation"), is a corporation with a mailing address at P.O. Box 1043, Mission, Texas 78572.

2. Respondent, Triple-T Distributing, Inc. (hereinafter "Triple-T"), is a corporation with a mailing address at 1495 Mateo Street, Los Angeles, California. At the time of the transaction involved herein, Triple-T was licensed under the Act.

3. On or about November 11, 1984, Plantation, in interstate commerce, sold to Triple-T by oral contract one trucklot of limes F.O.B., consisting of 70 units of 150 count cartons at 6.15 per unit, 162 units of 175 count cartons at $6.65 per unit, 174 units of 200 count cartons at $7.15 per unit, and 42 units of 250 count cartons at $7.15 per unit, for a total contract price of $3,052.20.

4. The limes were shipped by truck on November 13, 1984, and arrived at the contract destination at 2:00 a.m. the morning of November 16, 1984. During a telephone conversation with a representative of Plantation on the morning of the 16th, Triple-T rejected the limes. No inspection had been performed at the time this conversation occurred. When Plantation would not accept Triple-T's rejection, the conversation ended and Triple-T ordered the truck to leave the premises. Thereafter, upon instruction from Plantation to the trucker, the limes again were tendered for delivery and again rejected by Triple-T.

5. After Triple-T's second rejection of the limes Plantation consigned them to United Distributors, which at Plantation's direction ar

ranged for their Federal inspection. United Distributors ultimately sold the limes for $940.80.

6. Plantation paid freight charges of $604.80 on this trucklot of limes.

7. Plantation filed an informal complaint with the Secretary seeking $2,716.20 as reparation from Triple-T on July 8, 1985, which was within nine months of the time the cause of action accrued.

Subsidiary Findings and Conclusions

Plantation contends that it shipped limes which met contract specifications, and that Triple-T rejected them without reasonable cause upon their arrival in Los Angeles, the contract destination. Triple-T, on the other hand, contends in its verified answer that it had contracted for U.S. grade #1 limes, and that since Federal inspection showed the limes were not U.S. #1 grade, rejection was justified. Upon a careful analysis of the record, we conclude that Triple-T rejected the limes without reasonable cause in violation of the Act for which reparation must be awarded.

Without having the limes officially inspected, Triple-T twice rejected them on the morning of November 16, 1984. In a telegram sent to Plantation three days later on November 19, 1984, Triple-T said the "limes were rejected upon arrival Friday 11-16-84 due to poor quality -- yellow and silver." In Triple-T's July 24, 1984, reply to Plantation's informal complaint, Triple-T wrote, "When the load of limes (448 carton) *[sic]* arrived on November 16, 1985, *[sic]* at 2:00 in the morning, the condition of these limes were *[sic]* in poor condition. Due to this condition, we refused to unload the truck." Triple-T did not specify in this reply the exact condition which justified rejection even though it had the Federal inspection report in hand at the time the reply was drafted.

Triple-T claimed for the first time that the contract called for U.S. #1 grade limes in its February 19, 1986, formal answer to the formal complaint. Despite Triple-T's claim, we do not believe the contract

cified U.S. #1 grade limes because the invoice
he time the contract was negotiated did not
and it was not until more than a year after the
.hat Triple-T sought to explain its rejection on
es were not U.S. #1 grade. At the time Tri-
; it justified rejection on the ground of "poor
:r." In point of fact, according to the Federal
iit had the "good green color" required of U.S.
ibited only 9% scars, including 7% blanching,

which is within tolerances for U.S. #1 limes. (7 C.F.R. § 51.1000)[1] The limes failed to grade U.S. #1 only on account of 4% styler end breakdown, a condition not once mentioned by Triple-T in any document filed in this proceeding.[2] It appears that Triple-T's reference to the fact that the limes failed to grade U.S. #1 is an *ex post facto* justification for its rejection of the limes. We do not credit that justification. Since we find that the contract did not specify U.S. #1 grade limes, and the limes apparently met all contract specifications, Triple-T's rejection was without reasonable cause in violation of section 2 of the Act.

Even if the contract had, indeed, called for U.S. #1 limes, Triple-T nevertheless breached its duties as an aggrieved buyer, thereby rendering it liable to Plantation for damages. Section 2-603(1) of the Uniform Commercial Code sets out a merchant buyer's duties as to rightfully rejected goods.

> (1) Subject to any security interest in the buyer (subsection (3) of Section 2-711), when the seller has no agent or place of business at the market of rejection a merchant buyer is under a duty after rejection of goods in his possession or control to follow any reasonable instructions received from the seller with respect to the goods and in the absence of such instructions to make reasonable efforts to sell them for the seller's account if they are perishable or threaten to decline in value speedily. Instructions are not reasonable if on demand indemnity for expenses is not forthcoming.

As a merchant buyer of a perishable agricultural commodity, Triple-T was required to follow any reasonable instructions from the seller regarding produce which did not conform to the sale contract, and in the absence of reasonable instructions, to sell the produce for the seller's account.

In its verified statement Plantation recounted Triple-T's rejections as follows:

> I spoke to Anthony J. Rodosta of Triple-T at 10 AM (Texas time) on November 16, 1984, after having been informed by the truck broker, David Zapata, that Triple-T had instructed the truck driver to leave the premises with the limes. I asked Mr. Rodosta if the load had been inspected. He proceeded to inform me that the load had not been inspected, that he did not want the merchandise and that he refused to accept it. I objected to this very strongly. Furthermore, Mr. Rodosta, at no time, offered to work the load out.

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[1] Triple-T's reference to "silver" presumably refers to scars or blanching.

[2] We should also note that styler end breakdown is a progressive physiological condition which may have occurred during shipment (See 7 C.F.R. § 51.1009). Further, if the lines had exhibited no more that 1% styler end breakdown upon official inspection, they would have graded U.S. #1. We cannot say the breakdown shown when the limes were inspected in Los Angeles did not occur during transit.

> I asked the truck broker to send the truck back to Triple-T, which the truck broker did. Triple-T, once again, sent the truck away. The trucker was pushing the truck broker to unload the merchandise. Consequently, at 1 PM (Texas time), I asked United Distributors to unload the merchandise for our account.

The record contains an affidavit from David Zapata of A & A Truck Brokers which supports Plantation's version of the events of November 16, 1984. As the statements of an ostensibly neutral party, Mr. Zapata's corroborating statements are given great weight. *Homestead Tomato Packing Co. v. Mims Produce, Inc.*, 43 Agric. Dec. _____ (1984). Therefore, we do not credit Triple-T's claims that it offered to sell the limes for Plantation's account and that Plantation directed the truck to leave Triple-T's premises.

In short, assuming for the purposes of argument that Triple-T could have justifiably rejected the limes because official inspection revealed they were not U.S. #1 grade, by rejecting them over Plantation's protest before official inspection had been performed and by sending the shipment out into the streets, Triple-T violated its duties as a merchant buyer to seek and follow reasonable instructions from the seller regarding rejected produce and to arrange for resale if reasonable instructions were not forthcoming.

Section 5 of the Official Comments to section 2-603 of the Uniform Commercial Code states that a buyer who fails to make a salvage sale when required is subject to damages pursuant to a liberal administration of remedies in favor of the aggrieved seller.

Where the buyer rejects produce without reasonable cause, the seller may resell, and if accomplished in good faith and with reasonable care and judgment, the seller may recover the difference between the resale price and the contract price, plus incidental damages. *Mountain Lion Fruit v. United A.G. Stores*, 29 Agric. Dec. 61 (1970); *Barbera Packing v. Grand Union*, 28 Agric. Dec. 763 (1969); UCC @ 2-706. Based on the evidence of record, it appears the resale by United Distributors at Plantation's direction was accomplished in good faith and with reasonable care and judgment. The contract price of the limes was $3,052.20, and Plantation paid freight of $604.80. Since the resale of the limes generated $940.80, Plantation's damages in connection with this transaction were $2,716.20, which amount Triple-T will be ordered to pay as reparation for violation of section 2 of the Act.

Order

Within 30 days of the date of this order, respondent Triple-T Distributing, Inc., shall pay complainant Hunt Oil Company a/k/a Plantation Produce Company, as reparation $2,716.20, with interest thereon at the rate of 13% per annum from January 1, 1985, until paid.

Copies of this Order shall be served on the parties.

ERIC C. JAMESON, d/b/a JAMESON FARMS v. VALERIO'S PRODUCE COMPANY, INC.

PACA Docket No. 2-6961

Decision and order filed

Modification of Contract-proven by preponderance of evidence—Dumping-presumption against verbal waiver of the evidence of dumping required by regulations.

It was found that the parties, through the broker, agreed to a modification of the f.o.b. sale, following arrival of strawberries alleged by buyer to have arrived in poor condition. The terms of the modification called for resale with protection against loss without securing a federal inspection. Respondent resold the berries, but dumped a large portion of the load without securing the evidence of dumping required by the Regulations. It was held that, although there is a presumption against verbal waiver of the required evidence of dumping, respondent's evidence was sufficient to overcome the presumption as well as complainant's unsworn statement that he had not made such waiver

George S. Whitten, presiding officer.

Complainant, pro se

William J Fair, Springfield, Pennsylvania, for respondent.

Decision issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $3,212.00 in connection with the shipment in interstate commerce of a trucklot of strawberries.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant did not file an opening statement. Respondent filed an answering statement. Complainant did not file a statement in reply. Neither party filed a brief.

ERIC C. JAMESON d/b/a JAMESON FARMS v. VALERIO'S PRODUCE CO.

Findings of Fact

1. Complainant, Eric C. Jameson, is an individual doing business as Jameson Farms, whose address is P. O. Box 1077, Wimauma, Florida.

2. Respondent, Valerio's Produce Company, Inc., is a corporation whose address is 321-25 E. Penn Street, Norristown, Pennsylvania. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about December 26, 1984, complainant sold to respondent 480 flats of fresh strawberries at $10.60 per flat f.o.b. The sale was negotiated through C. H. Robinson Company acting as broker.

4. Complainant shipped the strawberries from loading point in Wimauma, Florida on December 26, 1984, by truck. The strawberries arrived at respondent's place of business in Norristown, Pennsylvania, on Friday, December 28, 1984. Upon receipt of the berries respondent noted that they were not in good condition and telephoned the broker, Lawrence L. Oleksa of C. H. Robinson Company, and informed him of the condition of the berries. The broker in turn called complainant, and secured complainant's agreement that no inspection would be necessary and that respondent would be allowed to work out the berries with protection against loss. This information was conveyed by the broker to respondent, and following the intervening New Year's weekend respondent proceeded to attempt to sell the strawberries. Respondent sold 268 flats of the strawberries at $7.00 per flat, and dumped the remaining 212 flats of strawberries. Respondent remitted the entire proceeds of the resale, or $1,876.00, to complainant.

5. The formal complaint was filed on July 1, 1985, which was within nine months after the cause of action alleged herein accrued.

Conclusions

Respondent's president, William Valerio, affirmed in the sworn answer that complainant agreed in a conversation with the broker following delivery of the berries to permit respondent to handle the berries with the understanding that complainant would protect respondent

e further understanding that no inspection

ıbmitted a copy of a letter from the had agreed that respondent could against loss, and that no inspection is letter was attached to the sworn ıent, and also was included in the ı. Complainant made no mention laint and made no reply to the an- lowever, during the informal stages l submit an unverified letter to the the Department's report of investi- nt emphatically denied that he had

deducting $1,196.10 from the $1,839.17 contract price between complainant and respondent, and computed that it owed complainant $641.07 as to this load.

Respondent dealt with the second load in a similar fashion. Mayfield reported to respondent that it dumped the majority of the potatoes in the second load, and showed gross proceeds of $324.00 in its accounting to respondent. Mayfield deducted for a federal inspection and a dumping fee, and remitted net proceeds of $243.40 to respondent. Respondent deducted these net proceeds from its $2,215.40 sale price to Mayfield, and computed a loss of $1,972.40.

Respondent, in its "accounting" to complainant deducted this loss of $1,972.40 from the $1,868.46 purchase price between respondent and complainant, resulting in a net loss between respondent and complainant on this load of $103.94. Respondent then, in effect, deducted the $103.94 from the remitted $537.13 to complainant. It is clear then that respondent was involved in two separate purchases and sale arrangements dealing with both complainant and Mayfield to its own profits and advantage, and not dealing on behalf of complainant as complainant's agent. No amount of contract verbiage describing a growers' agent relationship can overcome what actually happened in this case. We conclude that the potatoes were sold by complainant to respondent on a f.o.b. basis.

While the face of respondent's "GROWERS AGENT CONTRACT AND PICKUP TICKET" stated that all merchandise was guaranteed to destination as to grade and condition, and we have accepted this as a part of the contract terms, neither of the tickets specified a destination market although a blank space was provided for such specification. In addition, there is nothing in the record that would indicate that complainant knew the destination of either load of potatoes. Consequently, this provision of the contract cannot be given effect. The suitable shipping condition warranty specified in the regulations (7 C.F.R. § 46.43(i)(j)) also assures delivery without abnormal deterioration "at the contract destination agreed upon between the parties." We have held many times that the suitable shipping condition warranty is not applicable where a contract destination is not specified. See *B & L Produce v. Florence Distributing Co.*, 37 Agric. Dec. 78 (1978).

The federal inspection covering the first shipment of potatoes was too remote in time from the time of arrival of such potatoes to have been useful to determine abnormal condition at time of arrival, even had the suitable shipping condition warranty been applicable. Since respondent accepted these potatoes and has not proven a breach of warranty it is liable to complainant for their full price, or $1,837.17.

The inspection covering the second load was made on June 1, at 4:00 p.m., following shipment on May 30, and apparent arrival on May

terms can be implied or construed between the parties involved unless by agreement in writing prior to loading of any commodity covered by this contract.

PLEASE HAVE THE TRUCKER SIGN FOR CORRECT COURT RESPONSIBILITY AND RETAIN FOR YOUR FILES.

TRUCKER X _____

While several of the copies of the "GROWERS AGENT CONTRACT AND PICKUP TICKETS" had the above quoted document interleaved between them, respondent nowhere clearly asserted that complainant was furnished with a copy of such document. We infer that respondent would probably contend that the above quoted document we printed on the back of the "GROWERS AGENT CONTRACT PICKUP TICKET". However, complainant attached to the formal complaint the original of these tickets, apparently furnished to complainant by respondent, and the backs of these two documents are blank. We conclude that there is no adequate proof that complainant was ever furnished with a copy of the document quoted above. In addition we note that while the document appears to describe a growers' agent relationship, the actual relationship as it existed between complainant and respondent does not fit into that category as described in the regulations. Section 46.30(b) of the regulations provides in relevant part that:

> Growers' agents sell and distribute produce for or on behalf of growers and others . . . They usually distribute the produce in their own names and collect payment direct from the consignees. They render accountings to their principles, paying the net proceeds after deducting their expenses and fees.

In this case respondent contracted with complainant to pay $4.50 per hundredweight for both loads of potatoes. This is the price set forth on the "GROWERS AGENT CONTRACT AND PICKUP TICKET" on the date of shipment. However, on the same dates that the two loads of potatoes were shipped, respondent issued invoices to Mayfield Produce Company showing a sale by respondent to Mayfield of the same potatoes at a totally different price. Respondent sold the first load of potatoes to Mayfield at a price of $7.30 per hundredweight, or $1,163.13 above the price which it contracted to pay complainant. Respondent sold the second load of potatoes to Mayfield Produce for $5.30 per hundredweight, or a total of $346.94 more than it contracted to pay complainant. Moreover, respondent received an accounting on the first load from Mayfield Produce showing that all of the potatoes were sold to peddlers at $1.00 per bag, or gross proceeds of $2,055.00. Mayfield deducted for a federal inspection and for terminal storage, charges, and remitted $1,803.90 to respondent. Respondent deducted this amount from its $3,000.00 contract sale price of Mayfield, and computed a loss of $1,196.10. It then "accounted" to complainant by

FOB as to price; grade, quality and condition guaranteed to destination market. . . .

The document referred to by respondent is in the format of an invoice and is headed by the words "GROWERS AGENT CONTRACT AND PICKUP TICKET". It contains respondent's letterhead and logo and lists the grower as Dominic Schulist. It also states the date, which corresponds to the loading date, and then states "Load for your account on _____ Truck Lines." The document then gives a description of the merchandise, together with a price per hundredweight, and a total price. It also states in part at the bottom as follows:

> NOTICE ALL containers that are marked as to US Grade must be Federal and/or State inspected. All merchandise guaranteed to destination as to grade and condition.

Destination Market _____

Respondent also submitted an additional document which has no heading and consists of four paragraphs in small print which read in relevant part as follows:

> In compliance with the provisions of the Perishable Agricultural Commodities Act as amended to October 1st, 1962, this contract is issued pursuant to specific compliance with Sections 46.30, 46.31, 46.32 and 46.43(j) and price listed is FOB as to price only and includes containers.
>
> Nothing herein can be constructed to constitute a purchase FOB Farm, FOB Regular Terms, FOB Acceptance or FOB Acceptance Final. The price stated is invalid if the produce involved fails to arrive at the destination market in the condition and grade stated herein under normal transit conditions. All transportation . . . is through the medium of independent contractors. No agency relationship with any contractor can be construed by any words or action by any party, nor does any act concerning the arrangement or transportation, diversion, special instructions, or etc., constitute the exercising of an act of dominion over the commodity. A prompt discussion of any condition which will vary this contract as to price in transit or on arrival is the intent of the parties, however, in case of inability to timely take such action, the agent is authorized to act to protect the commodity involved. Agent is further authorized to use Brokers, Commission Merchants or Joint Partners in selling commodity when it is deemed advisable or advantageous to grower.
>
> So that proper responsibility under the Federal Food and Drug Act and/or any similar legislation be ascertained, it is not the intent of this Contract to convey title and/or responsibility to any party other than the grower with regard to any tolerance or ruling established or seizure ordered.
>
> The loading of merchandise designated herein denotes compliance with the terms herein stated, and no variance of these

about May 31, 1984, and were unloaded onto the customer's dock. On or about June 1, 1984, respondent sent a message to complainant through Robert Gilmeister, owner of Gilmeister Farms, Inc., that the potatoes arrived with excessive decay, and that a federal inspection was being procured on both loads. On June 1, 1984, at 4:00 p.m. the second load of potatoes was federally inspected while stacked on pallets on the dock of Mayfield Produce Company. The inspection showed the temperature of the potatoes, in various sacks, to be 75-F, and the condition to be as follows:

> Mostly firm. Soft rot 10 to 35%, average 25% slimy soft rot and wet Fusarium Tuber Rot in advance stages.

9. On June 22, 1984, at 9:00 a.m., 1340 paper sacks and 102 film sacks of the potatoes which remained in the cooler of respondent's customer were federally inspected while stacked on pallets in the cooler. The inspection showed the temperature of the potatoes, in various sacks, to be 40-F. The condition of the potatoes was stated to be as follows:

> Serious damage by shriveling 2 to 25%, average 11%. Soft rot 75 to 98%, average 89% slimy soft rot in various stages, mostly advanced.

10. Respondent reported to complainant a "loss" of $1,972.40 on the May 30, load of potatoes and $1,196.10 on the May 24, load of potatoes. Respondent paid complainant a total of $537.13 for both loads.

11. The formal complaint was filed on January 11, 1985, which was within nine months after the causes of action herein accrued.

Conclusions

In the formal complaint complainant claimed that the sale of the two loads of potatoes to respondent was on a f.o.b. basis. However, at other points in the proceeding complainant claimed that the sale was "f.o.b. final". Although the regulations (7 C.F.R. § 46.43(m)) define "f.o.b. acceptance final" as a trade term, there is no definition in the regulations for "f.o.b. final." There was no documentation to support such a term having been used and we find that the potatoes were not sold on a "f.o.b. final" basis.

Respondent maintains that it acted only as a growers' agent in regard to the potatoes. Specifically respondent states in its answer:

> The transactions for the loads of potatoes were handled on the basis of the growers sales agent as authorized by the Act, the loads were shipped by complainant and his representative acting on his behalf according to written growers agent contract and pickup ticket tendered in person by the truckers at the time of loading. . . The Growers Agent Contract and Pickup Ticket correctly states the terms of the growers sales agents contract, including specifically stating that the transactions were

2. Respondent, Wysocki Sales, Inc., is a corporation whose address is 6857 Highway 66, Custer, Wisconsin. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about May 24, 1984, complainant sold to respondent 41,000 pounds of unclassified Russet potatoes in 955 20 pound film sacks and 1100 20 pound mesh window type paper sacks at $4.50 per hundredweight, for a total of $1,849.50, less a $12.33 "promotion charge", or a net amount of $1,837.17. The terms of the sale were f.o.b. Gilmeister Farms, Inc. warehouse, Rosholt, Wisconsin, as to price; guaranteed to destination as to grade and condition. However, no destination market was specified.

4. On or about May 24, 1984, the potatoes referred to in Finding of Fact 3 were loaded on a truck hired by respondent and shipped to respondent's customer, Mayfield Produce Company, in Louisville, Kentucky. This destination was not known to complainant at the time of shipment.

5. The potatoes referred to in Finding of Fact 3 arrived at the place of business of respondent's customer in Louisville, Kentucky on or about May 25, 1984, and were unloaded into the customer's cooler. On or about May 29, 1984, respondent sent a message to complainant through Robert Gilmeister, owner of Gilmeister Farms, Inc., that the receiver was complaining about the quality of the potatoes. Complainant received this message on the same day. On June 1, 1984, at 3:00 p.m., the potatoes were federally inspected while stacked on pallets in Mayfield Produce Companies' Cooler. The inspection showed the temperature of the potatoes, in various sacks, to be 46-F, and the condition to be as follows:

> Mostly firm. Soft Rot 15 to 50%, average 35% slimy soft rot and wet Fusarium Tuber Rot in advanced stages.

6. On or about May 30, 1984, complainant sold to respondent, 41,800 pounds of unclassified Russett potatoes in 20 pound mesh window type paper sacks at $4.50 per hundredweight, for a total of $1,881 dollars, less a $12.54 "promotion charge", or a net amount of $1,868.46. The terms of the sale were f.o.b. Gilmeister Farms, Inc. warehouse, Rosholt, Wisconsin, as to price; guaranteed to destination as to grade and condition. However, no destination market was specified.

7. On or about May 30, 1984, the potatoes referred to in Finding of Fact 6 were loaded on a truck hired by respondent and shipped to respondent's customer, Mayfield Produce Company, in Louisville, Kentucky. This destination was known to complainant at the time of shipment.

8. The potatoes referred to in Finding of Fact 6 arrived at the place of business of respondent's customer in Louisville, Kentucky on or

PACA Docket No. 2-6758

Decision and order filed April 10, 1987.

Grower's agent contract, failure to establish—F.O.B. contract, merchandise guaranteed to destination—Contract destination, failure to specify—Warranty of merchantability.

Respondent purchased two loads of potatoes from complainant and had them shipped to respondent's customer. Respondent contended, as a defense to complainant's action, that it represented complainant as a grower's agent. It was found that respondent's dealings relative to the two transactions evidenced a purchase and sale and not a growers' agent relationship. Complainant was found to have sold the potatoes to respondent on a F.O.B. basis with merchandise guaranteed to destination. However, no contract destination was specified and the contract guarantee as well as the suitable shipping condition warranty were found to be inapplicable. The federal inspection covering the second load was made promptly and showed a large amount of soft rot. Therefore, the question was considered whether a breach of the warranty of merchantability applicable at shipping point might be demonstrated, and was answered in the affirmative. Damages were computed in respondent's favor as to this load.

George S. Whitten, Presiding officer.

Complainant, pro se.

Respondent, pro se.

Decision issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $3,168.50 in connection with the shipment in interstate commerce of two truckloads of potatoes.

A copy of the report of investigation made by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, and respondent filed an answering statement. Respondent filed a brief.

Findings of Fact

1. Complainant, Dominic Schulist, is an individual whose address is 220 Cty. A, Rosholt, Wisconsin.

ant. The official comment to this section states in relevant part as follows:

> Although the older rule at common law which made the seller liable for all consequential damages of which he had "reason to know" in advance is followed, the liberality of that rule is modified by refusing to permit recovery unless the buyer could not reasonably have prevented the loss by cover or otherwise.

We think that the record clearly shows that complainant could have easily prevented the consequential damages which it is claiming herein by a simple inspection of the lettuce prior to processing. In any event, complainant had the burden of proving by a preponderance of the evidence that the loss which it incurred could not have been reasonably prevented by such an inspection. Complainant has not met this burden.

Complainant was credited by respondent with the full invoice price of the load of lettuce. However, the record shows that the freight in the amount of $400.00 was paid by complainant and has not been reimbursed by respondent. In addition, the dumping charges claimed by complainant in the total amount of $300.00 do not fall into the category of consequential damages which could have been prevented by complainant, and should therefore be allowed. There remains the question of vacuum cooling charges on the 34 bins of lettuce which were dumped in the total amount of $272.00. Complainant has not explained why such vacuum cooling charges were incurred, and it seems to us that such charges could have been prevented by proper inspection of the lettuce prior to the vacuum cooling having been performed. Consequently, we will not allow such vacuum cooling charges. The total amount which we have found to be due to complainant from respondent is $700.00. Complainant withheld $2,973.88 from respondent on the shipments of March 29, and 30, 1984. The deduction of $700.00 from such amount leaves $2,273.88, which respondent should recover from complainant on its counterclaim. Complainant's failure to pay such amount to respondent is a violation of section 2 of the Act for which reparation should be awarded to respondent with interest.

Order

The complaint is dismissed.

Within 30 days from the date of this order, complainant shall pay to respondent, as reparation, $2,273.88, with interest thereon at the rate of 13% per annum from May 1, 1984, until paid.

Copies of this order shall be served upon the parties.

---

6. The informal complaint was filed on October 29, 1984, which was within nine months after the cause of action applicable thereto accrued. The informal counterclaim was filed on November 19, 1984, which was within nine months after the cause of action applicable thereto accrued.

Conclusions

The two partial loads of lettuce shipped by respondent to complainant on March 29, and 30, 1984, for prices totaling $4,038.75, were accepted by complainant without complaint. No substantive dispute relative to these transactions was litigated in this proceeding. Complainant admits that it withheld payment in the amount of $2,973.88 as to these two transactions purely because of its claim for damages relative to the April 10, 1984, shipment of lettuce.

As to the April 10, 1984, shipment of lettuce, it is clear that respondent breached the contract of sale by shipping lettuce which had excessive tipburn. Respondent maintains that when it agreed to credit complainant with the invoice price of the lettuce, plus pay the freight applicable thereto, the matter was settled between the parties, and there should be no further liability on respondent's part. Complainant maintains that respondent is liable for consequential damages which it alleges were caused by respondent's breach. These damages consist of vacuum cooling charges on the 34 bins of lettuce which were not processed and were dumped, plus (apparently) the retail price of the 130 cartons processed and packaged, and a lesser price for 3600 pounds processed but not packaged, plus charges for lost time for labor resulting from an alleged slowdown due to complainant's attempt to remove particles of damaged lettuce before the packaging process, plus resulting overtime costs due to the alleged slowdown, plus costs incurred in the dumping of the unprocessed 34 bins of lettuce.

We do not think that the evidence demonstrates that the agreement by respondent's Gail Hart to credit complainant with the invoice price and pay freight was understood between the parties as a complete settlement of respondent's liability to complainant so as to amount to a rescission of the contract. However, this does not mean that the entire damages claimed by complainant should be allowed. The Uniform Commercial Code, Section 2-715, deals with buyers' incidental and consequential damages. Such section provides in relevant part that "consequential damages resulting from the seller's breach include (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise . . ." While the record in this case might enable us to presume that respondent knew of the requirements and needs of complainant at the time of contracting, the real question is whether the resulting loss claimed by complainant could not reasonably have been prevented by complain

plainant filed an opening statement, respondent filed an answering statement, and complainant filed a statement in reply. Complainant also filed a brief.

Findings of Fact

1. Complainant is a partnership composed of CTM & Associates, Inc., Sun Harvest, Inc., and Time Saver Salad, Inc., doing business as Premium Fresh Farms, whose address is P. O. Box 4238, Salinas, California. At the time of the transactions involved herein, complainant was licensed under the Act.

2. Respondent, Cal-Fresh, Inc., is a corporation whose address is P. O. Box 4040, Salinas, California. At the time of the transactions involved herein, respondent was licensed under the Act.

3. On or about March 29, and 30, 1984, respondent sold to complainant two trucklots of bulk lettuce at F.O.B. prices totaling $4,038.75. Respondent shipped the lettuce on March 29, and 30, 1984, from the State of Arizona to complainant in the State of California. The lettuce was accepted by complainant on arrival, and complainant has paid respondent a total of $1,064.87, leaving a balance still due to respondent of $2,973.88.

4. On or about April 10, 1984, respondent sold to complainant one truckload of bulk Iceberg lettuce in bin containers, field run, with the warranty that such lettuce would be free of tipburn. Respondent described the lettuce to complainant at the time as "one head in 20 with salt and pepper tip burn." The load of lettuce contained 43,555 pounds and was priced at 7¢ per pound F.O.B. Huron, California, or a total price of $3,048.85. The lettuce was shipped from Huron, California to complainant in Salinas, California, on April 10, 1984. The lettuce was purchased for processing and over 90% of the product of complainant's processing plant is shipped in interstate commerce.

5. Following arrival of the lettuce at complainant's processing plant on the evening of April 10, 1984, complainant accepted the lettuce by unloading it into its cooler. On the following morning, complainant began processing the lettuce without subjecting it to any inspection. During the course of processing the lettuce, Monterey County inspectors "redtagged" 130 cartons of the processed product which was ready for shipment because of excessive discoloration due to tipburn. At this point, complainant contacted respondent's representative, Gail Hart, and advised her of the excessive tip burn in the lettuce. A short while thereafter, Gail Hart arrived at complainant's processing plant and personally inspected the lettuce and confirmed that the damage by tipburn was excessive. Gail Hart agreed that complainant could dump the lettuce and stated that respondent would credit complainant with the invoice price of the lettuce and pay the freight charges from Huron to Salinas.

6. The informal complaint was filed on October 29, 1984, which was within nine months after the cause of action applicable thereto accrued. The informal counterclaim was filed on November 19, 1984, which was within nine months after the cause of action applicable thereto accrued.

Conclusions

The two partial loads of lettuce shipped by respondent to complainant on March 29, and 30, 1984, for prices totaling $4,038.75, were accepted by complainant without complaint. No substantive dispute relative to these transactions was litigated in this proceeding. Complainant admits that it withheld payment in the amount of $2,973.88 as to these two transactions purely because of its claim for damages relative to the April 10, 1984, shipment of lettuce.

As to the April 10, 1984, shipment of lettuce, it is clear that respondent breached the contract of sale by shipping lettuce which had excessive tipburn. Respondent maintains that when it agreed to credit complainant with the invoice price of the lettuce, plus pay the freight applicable thereto, the matter was settled between the parties, and there should be no further liability on respondent's part. Complainant maintains that respondent is liable for consequential damages which it alleges were caused by respondent's breach. These damages consist of vacuum cooling charges on the 34 bins of lettuce which were not processed and were dumped, plus (apparently) the retail price of the 130 cartons processed and packaged, and a lesser price for 3600 pounds processed but not packaged, plus charges for lost time for labor resulting from an alleged slowdown due to complainant's attempt to remove particles of damaged lettuce before the packaging process, plus resulting overtime costs due to the alleged slowdown, plus costs incurred in the dumping of the unprocessed 34 bins of lettuce.

We do not think that the evidence demonstrates that the agreement by respondent's Gail Hart to credit complainant with the invoice price and pay freight was understood between the parties as a complete settlement of respondent's liability to complainant so as to amount to a rescission of the contract. However, this does not mean that the entire damages claimed by complainant should be allowed. The Uniform Commercial Code, Section 2-715, deals with buyers' incidental and consequential damages. Such section provides in relevant part that "consequential damages resulting from the seller's breach include (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise . . ." While the record in this case might enable us to presume that respondent knew of the requirements and needs of complainant at the time of contracting, the real question is whether the resulting loss claimed by complainant could not reasonably have been prevented by complain

plainant filed an opening statement, respondent filed an answering statement, and complainant filed a statement in reply. Complainant also filed a brief.

Findings of Fact

1. Complainant is a partnership composed of CTM & Associates, Inc., Sun Harvest, Inc., and Time Saver Salad, Inc., doing business as Premium Fresh Farms, whose address is P. O. Box 4238, Salinas, California. At the time of the transactions involved herein, complainant was licensed under the Act.

2. Respondent, Cal-Fresh, Inc., is a corporation whose address is P. O. Box 4040, Salinas, California. At the time of the transactions involved herein, respondent was licensed under the Act.

3. On or about March 29, and 30, 1984, respondent sold to complainant two trucklots of bulk lettuce at F.O.B. prices totaling $4,038.75. Respondent shipped the lettuce on March 29, and 30, 1984, from the State of Arizona to complainant in the State of California. The lettuce was accepted by complainant on arrival, and complainant has paid respondent a total of $1,064.87, leaving a balance still due to respondent of $2,973.88.

4. On or about April 10, 1984, respondent sold to complainant one truckload of bulk Iceberg lettuce in bin containers, field run, with the warranty that such lettuce would be free of tipburn. Respondent described the lettuce to complainant at the time as "one head in 20 with salt and pepper tip burn." The load of lettuce contained 43,555 pounds and was priced at 7¢ per pound F.O.B. Huron, California, or a total price of $3,048.85. The lettuce was shipped from Huron, California to complainant in Salinas, California, on April 10, 1984. The lettuce was purchased for processing and over 90% of the product of complainant's processing plant is shipped in interstate commerce.

5. Following arrival of the lettuce at complainant's processing plant on the evening of April 10, 1984, complainant accepted the lettuce by unloading it into its cooler. On the following morning, complainant began processing the lettuce without subjecting it to any inspection. During the course of processing the lettuce, Monterey County inspectors "redtagged" 130 cartons of the processed product which was ready for shipment because of excessive discoloration due to tipburn. At this point, complainant contacted respondent's representative, Gail Hart, and advised her of the excessive tip burn in the lettuce. A short while thereafter, Gail Hart arrived at complainant's processing plant and personally inspected the lettuce and confirmed that the damage by tipburn was excessive. Gail Hart agreed that complainant could dump the lettuce and stated that respondent would credit complainant with the invoice price of the lettuce and pay the freight charges from Huron to Salinas.

PREMIUM FRESH FARMS v. CAL-FRESH, INC.

PACA Docket No. 2-7033

Decision and order filed April 2, 1987.

Rescission of contract—Consequential damages, prevention of loss by damaged party.

Respondent breached its contract with complainant by supplying complainant with lettuce for processing which contained excessive tipburn. Respondent's representative agreed with complainant, subsequent to delivery and initiation of the processing of the lettuce, to credit complainant with the invoice cost of the lettuce, plus pay applicable freight. It was found that this agreement was not intended as a complete settlement of respondent's liability so as to amount to a rescissioon of the contract. Respondent's claim for consequential damage was, however, largely disallowed due to the fact that such damages could have been prevented by respondent's inspection of the lettuce prior to processing.

George S. Whitten, presiding officer.

Complainant, pro se.

Thomas R. Oliveri, Newport Beach, California, for respondent.

Decision issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the total amount of $3,245.88 in connection with the shipment of a truckload of lettuce in contemplation of subsequent movement of the product of such lettuce in interstate commerce.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability to complainant, and counterclaiming against complainant in the amount of $2,973.88 in connection with two shipments of lettuce, March 29, and 30, 1984, as to which complainant withheld payment in the amount of $2,973.88 because of damages allegedly stemming from the April 10, 1984, load of lettuce which is the subject of the complaint herein. Complainant filed a reply to respondent's counterclaim denying any liability thereunder.

The amount claimed in neither the formal complaint nor the counterclaim exceeds $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Com

was on February 23. This is within what would be considered normal transit time and thus the warranty of suitable shipping condition applicable in f.o.b. sales would not be voided on account of abnormal time in transit. Respondent did not offer in evidence a copy of the tape from the Ryan temperature recorder, however, complainant did not question respondent's failure to offer the Ryan tape. *Louis Carle & Sons v. Ben Gatz Co.*, Inc., 38 Agric. Dec. 1486 (1979). The temperature disclosed by the Federal inspection at destination is somewhat high but within the normal range. The factor which is most damaging to respondent's attempt to prove a breach of contract on the part of complainant in this case is the length of time which elapsed between arrival of the produce and respondent's securing of a Federal inspection. Even if we were to accept respondent's contention that the produce arrived on February 25 (which would require a reassessment of our conclusion that transit time was normal), there still is no indication in the record as to why respondent waited two days to secure a Federal inspection. In fact, we have determined that respondent waited four days to secure a Federal inspection. Considering the amount of damage disclosed by the Federal inspection, we conclude that too much time elapsed for such inspection to be used to show a breach of the suitable shipping condition warranty. *Max Feldbaum & Sons v. Alderiso*, 27 Agric. Dec. 763 (1968); *Heitzman Produce v. Palella*, 26 Agric. Dec. 921 (1967); *Pan-American Fruit Company v. Halem Hazzouri*, 25 Agric. Dec. 681 (1966); *S. E. Lankford & Sons v. Mach*, 19 Agric. Dec. 1316 (1960); *Peter Condakes Co. v. Michael Bros*, 19 Agric. Dec. 650 (1960); and *Inness Bros. v. Fruit Supply Co.*, 17 Agric. Dec. 580 (1958).

We conclude from all of the evidence herein that respondent accepted the subject produce and has not proven a breach of contract on the part of complainant. Respondent, therefore, is liable to complainant for the full purchase price of the nappa and spinach, or $7,207.50. Respondent's failure to pay such amount to complainant is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest. The counterclaim should be dismissed.

Order

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $7,207.50, with interest thereon at the rate of 13% per annum from March 1, 1985, until paid.

The counterclaim is dismissed.

Copies of this order shall be served upon the parties.

tended that he resisted Mr. O'Connor's urging with the protest that California nappa at that time of year contained seedstalk, and was assured by Mr. 0'Connor that complainant had nappa which did not contain seedstalk. Mr. Limm further maintained that after he requested that Mr. O'Connor spot-check the fields to be sure that the nappa did not contain seedstalk, he has informed by Mr. O'Connor that there indeed was nappa available which did not contain seedstalk. Mr. Limm contends that he again asked Mr. O'Connor to check the truck immediately prior to its leaving complainant's dock and was again informed by Mr. O'Connor that the nappa did not contain seedstalk. Mr. Limm also asserted that the nappa arrived not on February 23, but on February 25, 1985, and that following arrival on that date, he contacted Mr. 0'Connor by telephone and rejected the load of produce. Mr. Limm further alleged that he has persuaded by Mr. O'Connor to take the produce and sell it as complainant's agent following this rejection. Mr. Limm maintains that expenses of the resale exceeded the amounts realized from the produce, and counter claims for the claimed difference in the amount of $225.60. Mr. Limm further asserted that the sale has not f.o.b., but rather, "on credit terms." In addition, Mr. Limm maintained that the cabbage was short on weight. We have carefully considered the entire record in this matter and have found on the basis of all of the evidence in favor of the contentions of complainant. We have made this finding in spite of the fact that at least one of respondent's contentions, if viewed in isolation from the remaining issues involved in this proceeding, would be deemed to be supported by a preponderance of the evidence. We refer to respondent's counterclaim that the sale of the produce was not on a f.o.b. basis. As respondent points out, complainant's invoice and bill of lading nowhere state that the sale was f.o.b. However, even if we had found in respondent's favor in regard to this contention, the results which we reach herein would not be changed. Indeed, if we had found that respondent was correct in alleging that the sale was not f.o.b., respondent's likelihood of prevailing herein would have been substantially reduced. First, it should be noted that f.o.b. terms of sale are in no way inconsistent with the credit terms alleged by respondent. Indeed, complainant concedes that the produce was sold on a credit basis. Second, if this nappa was not sold on an f.o.b. basis, we are are left with a sale at shipping point to which there would only be applicable a warranty of merchantability. For respondent to prove on the basis of a February 27, Federal inspection that the subject nappa was unmerchantable at time of shipment on February 19, would be virtually impossible under all of our prior decisions. *North American Produce Distributors, Inc. v. Eddie Arakelian*, 41 Agric. Dec. 759(1982).

It is clear from the evidence herein that respondent did complain about the nappa following its arrival. We have determined that arrival

place of business on Saturday, February 23, 1985. On the following afternoon, Sunday, February 24, 1985, Mr. Limm called Mr. O'Connor by telephone and reported that the cabbage arrived showing evidence of flowering seedstems. Mr. O'Connor reminded Mr. Limm that respondent had been advised at the outset that the Cabbage contained flowering seedstems and offered to take the cabbage back from respondent without any obligation on respondent's part. Mr. Limm advised that he needed the cabbage and did not want it taken away.

5. On Wednesday, February 27, 1985, at 11:55 a.m., the cabbage was Federally inspected while still on the truck at respondent's place of business. Such inspection disclosed in relevant part, as follows:

> Condition of Equipment : Vents closed, doors open, temperature control unit not in operation.
>
> Products Inspected: NAPA in crates stamped "Dana, P. O. Box 54, Nipomo,CA 03444." Applicant's Count : 870 crates.
>
> Condition of Load: Through lengthwise load, 5 rows, 7 layers.
>
> Condition of Pack: Fairly tight. Crates paper lined.
>
> Temperature of Product: Range 41°F to 44°F at various locations.
>
> . . .
>
> Quality: Clean and well trimmed. Heads affected by flowering seedstalks, 5 to 8½ inches in length, range 10 to 56%, average 33%.
>
> Condition: Heads are mostly fresh, crisp and outer leaves light green color. Heads affected by internal tip burn range 10 to 50% in most crates, and many none, average 14%. Soft rot ranges 10 to 33% in most crates, in many none, average 14% Bacterial Soft Rot in various stages, mostly early affecting the tips of seedstalks and adjacent innerleaves.
>
> Grade: No established U. S. Grade.
>
> Remarks: Inspection and certificate restricted to product and lading in all layers of 6 stacks nearest rear doors and upper 2 layers of next 3 stacks. Labor furnished by applicant to make load accessible.

6. The formal complaint was filed on June 24 1985, which was within nine months after the cause of action herein accrued.

Conclusions

The above findings of fact reflect the position of complainant as to all of the significant issues of fact in contention in this proceeding. Respondent, in contrast to our findings above, contended that it's Mr. Limm was called by complainant's Mr. O'Connor on February 18, and was urged by Mr. O'Connor to purchase the nappa. Mr. Limm con-

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complaint, and alleging a counterclaim arising out of the same transaction in the amount of $225.60. Complainant did not file a reply to the counterclaim and such is therefore deemed to be denied (7 C.F.R. § 47.9(c)).

The amount claimed in neither the formal complaint nor the counterclaim exceeds $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, respondent filed an answering statement, and complainant filed a Statement in reply. Both parties filed a brief.

Findings of Fact

1. Complainant, Phelan & Taylor Produce Co., Inc., is a corporation whose address is P.O. Box 458, Oceano, California. At the time of the transaction involved herein, Complainant was licensed under the Act.

2. Respondent, Continental Farms, Inc., is a corporation whose address is R.D. #2, Box 107, Wrightstown, New Jersey. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On or about February 18, 1985, respondent's president, John C. Limm,contacted complainant's sales manager, Casey P. O'Connor, by telephone and inquired about the possibility of purchasing a quantity of wire bound crates of nappa cabbage along with some cartons of spinach. At that time, Mr. O'Connor advised Mr. Limm that all the nappa cabbage available contained flowering seedstems. Mr. Limm requested that Mr. O'Connor inspect the nappa cabbage personally in the fields and ascertain the extent of the flowering seedstems. Mr. O'Connor subsequently made this inspection and reported back to Mr. Limm that a spot-check of the fields disclosed that nappa a cabbage with seedstalk 2 to 3 inches was available. Mr. Limm then requested a shipment of 870 cartons of nappa Cabbage and 200 cartons of spinach. The nappa was sold for $6 50 per carton, or a total of $5,655.00, and the spinach for $7.0O per carton, or a total of $1,400.00. A Ryan temperature recorder was also included on the truck at $22.50, and cooling was charged at $130.00. The total price for the shipment was $7,207.50 f.o.b.

4. The nappa and spinach were shipped by complainant from loading point in Oceano, California, to respondent in Wrightstown, New Jersey, on February 19, 1985, by truck. The truck arrived at respondent's

plainant contends that it had an exclusive agency with Interfruit, and that respondent violated the Act by paying Interfruit directly. It appears that the case arose when complainant was unable to collect on certain claims it had against Interfruit arising out of its agency agreement.

For complainant's position that a purchaser of goods violates the Act by paying in full for them directly to a principal from whom they are purchased, instead of paying that principal's agent, complainant does not cite any authority and we do not know any. The complaint is dismissed on that basis.

Because of the result reached, we do not decide the question of sufficiency of the notice to respondent of complainant's exclusive agency agreement.

The complaint is hereby dismissed.

Copies of this order shall be served on the parties.

PHELAN & TAYLOR PRODUCE CO., INC. v. CONTINENTAL FARMS, INC.

PACA Docket No. 2-7043.

Decision and order filed April 10, 1987.

F.O.B. sale—Suitable shipping condition rule—Inspection-delay in securing.

Respondent was found to have purchased a load of nappa and spinach on a f.o.b. basis. Respondent's allegation that the nappa was guaranteed to be free from flowering seedstems was found to be not supported by a preponderance of the evidence. A Federal inspection four days following arrival showing an average of 14% tipburn and 14% Bacterial Soft Rot was found to be too remote from arrival time to show a breach of the warranty of suitable shipping condition.

George S. Whitten, Presiding Officer.

Thomas R. Oliveri, Newport Beach, California, for complainant.

Steven Friedman, Moulton, New Jersey, for respondent.

Decision issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $7,207.50 in connection with the shipment in interstate commerce of a trucklot of nappa and spinach.

32 Agric. Dec. 702 (1973). Complainant has failed to present any evidence to show that the tomatoes were delivered to, and received and/or accepted by, respondent. In the face of respondent's denial of the existence of a contract or receipt of the load of tomatoes, complainant had to do more than submit the documents it did to prove its case. An affidavit from the trucker would have constituted independent evidence as to the destination of the tomatoes. Complainant has failed to meet its burden of proof, and his complaint must, accordingly, be dismissed.

Order

The complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

NORTH COUNTY FRUIT SALES, INC. v. CAAMANO BROS., INC.

PACA Docket No. 2-6987.

Order filed April 14, 1987.

John J. Casey, Presiding Officer.

Thomas R. Oliveri, Newport Beach, California, for complainant

Respondent, pro se

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended, 7 U.S.C. 499a *et seq.* A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $24,952.50 in connection with a shipment of mangoes in foreign commerce.

A copy of the report of investigation prepared by the Department was served on each party. A copy of the formal complaint was served on respondent, which filed an answer thereto, denying liability.

Since neither party requested an oral hearing, the shortened procedure provided in section 47.20 of the Rules of Practice, 7 C.F.R. §47.20, is applicable. Pursuant to that procedure, the report of investigation is considered a part of the evidence, as are the verified complaint and answer. Each party was given notice of opportunity to submit additional evidence in the form of verified statements, and to file briefs. Complainant filed such evidence. Respondent filed material pursuant to such notice, which was returned because it was not filed within the time limit specified in the Rules of Practice. Briefs were received from both parties.

It is undisputed that respondent negotiated directly with another firm, Interfruit, Inc., for a purchase of mangoes from Mexico, received them, and made full payment for them directly to Interfruit. Com

spondent in the amount of $8,000.00, the balance due in connection with one transaction in interstate commerce involving one shipment of tomatoes.

A copy of the formal complaint was served upon respondent and a copy of the report of investigation prepared by the Department was served on both parties. Respondent filed an answer to the complaint alleging that respondent neither contracted for, nor authorized anyone to contract for, the tomatoes. Since the amount claimed as damages did not exceed $15,000.00, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) was followed. Pursuant to this procedure, the verified pleadings are considered part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to submit further information by way of verified statements. On October 31, 1985, respondent filed a verified affidavit of Emanuella L. Peraino. Although given the opportunity to do so, neither party filed a brief.

Findings of Fact

1. Complainant, Lewis J. Nobles, Jr., is an individual doing business as Nobles Packing Co., and whose mailing address is Post Office Box 160, Immokalee, Florida 33934. At all times material herein, complainant was licensed under the Act.

2. Respondent, Emanuella L. Peraino, is an individual doing business as the Tomato Outlet whose mailing address is 1800 9th Street, Kenner, New Orleans, Louisiana 70062. At all times material herein, respondent was licensed under the Act.

3. On or about November 8, 1984, complainant, by oral contract, sold one truckload of U.S. combination tomatoes containing 1440 boxes of 6x6 and larger tomatoes, and 160 boxes of 5x6 tomatoes. The total invoiced sales price of the tomatoes was $8,000.00, f.o.b.

4. On or about November 9, 1984, the tomatoes were inspected and found to grade U.S. combination with at least 85% U.S. No. 1.

5. On or about November 8, 1984, the tomatoes were shipped via truck from complainant's place of business to an unknown destination.

6. A formal complaint was filed on February 12, 1985, which was within nine months of when the cause stated herein accrued.

Conclusions

Complainant claims an oral contract was entered into by the parties and that the produce was shipped pursuant to that contract. Complainant submitted an invoice(s), a point of origin inspection certificate and a shipping manifest in documentation of its claim. Respondent denies entering any contract, *or* having any contact for that matter with complainant, and denies receipt or acceptance of the tomatoes.

Complainant has the burden of proof in establishing all elements of a *prima facie* case. See *New York Trade Association v. Sidney Sandler*,

inspection. The *Walters Produce* case, however, fits readily into the category of conscious ignorance. The shipper knew when he agreed to the rescission that he was ignorant of the arrival time of the car and that such arrival time is always material in interpreting the result of a federal inspection. The shipper, however, chose to remain ignorant of the arrival time of the produce. The same comments apply to the case of *Admiral Packing Co. v. Prevor Mayrsohn International, Inc.*, 41 Agric. Dec. 99(1982) which the *Walters Produce* case followed. We find that in the present case, the contract modification should be set aside on both the grounds of misrepresentation and mistake.

Since the lettuce made good delivery, and was accepted by respondent, respondent became liable to complainant for the full purchase price of the lettuce subject to the adjustment for market decline. Respondent's failure to pay complainant the adjusted purchase price of $5,264.10 is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

Order

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $5,264.10, with interest thereon at the rate of 13 percent per annum from June 1, 1985, until paid.

Copies of this order shall be served upon the parties.

LEWIS J. NOBLES, JR., d/b/a NOBLES PACKING CO. v. EMANUELLA L. PERAINO d/b/a TOMATO OUTLET.

PACA Docket No. 2-6917

Decision and order filed April 24, 1987.

Complainant has burden of proof in establishing all elements of a prima facie case—Failure to prove delivery to receipt by or acceptance of produce, where respondent denies same, is failure to prove an essential element of *prima facie* case.

Complainant claimed oral contract selling boxes of tomatoes to respondent Respondent denied, since there was no evidence of delivery to, receipt by or acceptance of produce by respondent the complaint is dismissed.

Alan R. Kahan, presiding officer.

Complainant, pro se

David J. McMahan, New Orleans, Louisiana, for respondent.

Decision issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. § 499 *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against re

ment to § 154(b) to show what is meant by awareness of "limited knowledge" makes this clear:

> The facts being otherwise as stated in Illustration 2 to § 152, A proposes to B during the negotiations the inclusion of a provision under which the adversely affected party can cancel the contract in the event of a material error in the surveyor's report, but B refuses to agree to such a provision. The contract is not voidable by A, because A bears the risk of the mistake.

> The comment to § 154(b) explains the section as follows: Conscious ignorance. Even though the mistaken party did not agree to bear the risk, he may have been aware when he made the contract that his knowledge with respect to the facts to which the mistake relates was limited. If he was not only so aware that his knowledge was limited but undertook to perform in the face of that awareness, he bears the risk of the mistake. It is sometimes said in such a situation that, in a sense, there was not mistake but "conscious ignorance".

That this is the correct interpretation of § 154(b) is also necessitated by the Restatement's definition of mistake: "A mistake is a belief that is not in accord with the facts." Any belief that is not in accord with the facts must *always* be due to limited knowledge. If § 154(b) had in view that general awareness of limited knowledge which all reflective humans possess, all parties would always bear the risk of their mistake under §§ 152 and 153 and there would be no law relating to mistake.

In the present case, complainant had no knowledge on May 6 that an additional inspection had been made on May 3. Indeed, complainant had been told by respondent through the broker, that an inspection could not be made on May 3. Of course, one might contend that complainant nevertheless was aware on May 6 that he had limited knowledge as to very many events which occurred on May 3, 1985. And it might additionally be pointed out that complainant's ignorance concerning the many events of May 3 encompassed a very significant inspection which took place on that day. However, this ignorance would be obviously unconscious ignorance and not conscious ignorance. If in the present case complainant had been told by respondent that a May 3 inspection existed and complainant had then said, "Don't bother reading it to me. The May 6 inspection is sufficient," then we would have a case of conscious ignorance and complainant would bear the risk of his mistaken belief that the lettuce did not make good delivery.

The case of the *Walters Produce, Inc. v. Francis Produce Co.*, PACA Docket No. 2-6025, decided Jan. 10, 1985, on reconsideration, found that a shipper who had agreed to rescind the original contract upon receiving the report of an inspection disclosing poor condition of produce, could not repudiate the rescission upon later learning that the car load of produce had arrived some three days before the

it amounted to a misrepresentation. As we have before indicated the misrepresentation was certainly material, and complainant was certainly justified in relying upon it under the circumstances of this case. The contract modification was voidable under § 164(1) of the Restatement.

Turning to the category of mistake as a possible reason for setting aside the contract modification it is apparent that the facts of the present case may be viewed as falling under either § 152 or 153 of the Restatement. Section 152 provides in relevant part that:

> Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake under the rule stated in § 154.

Section 153 provides in relevant part that:

> Where a mistake of any party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake under the rule stated in § 154 and
>
> • • •
>
> (b) the other party had reason to know of the mistake or his fault caused the mistake.

The applicability of both of these sections is expressly made dependent on whether the adversely affected party bears the risk of the mistake under the rule stated in § 154. Under § 154, "A party bears the risk of a mistake when... (b) *he is aware*, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient... ." (emphasis supplied) To properly interpret this section, we must take it as given that all human knowledge is limited. Put another way, it is understood that the "mistakes" which are being treated in the Restatement are mistakes which *consist in* limited knowledge. Again, illustration 2 to § 152 states:

> A contracts to sell and B to buy a tract of land, on the basis of the report of a surveyor whom A has employed to determine the acreage. The price is, however, a lump sum not calculated by the acreage. Because of an error in computation by the surveyor, the tract contains ten percent more acreage than he reports. The contract is voidable by A....

Like all reasonable men, A knows that pharmacists, accountants, lawyers, surveyors and even judges sometimes make errors in their computations. Knowing this, A could have checked the surveyor's computations himself or hired someone else to do so. Thus, in one sense, he was aware that he had limited knowledge with respect to the facts to which the mistake related. However, this cannot be the sense intended by the writers of the Restatement. The illustration given in the com

the transaction and that the transaction would be materially affected by the information" about the May 3 inspection. It is thus certain that responsible personnel at respondent's firm knew about the May 3 inspection on May 3, and took significant action based upon such knowledge on May 3. We conclude that respondent's knowledge of the May 3 inspection was effective for the subject lettuce transaction at least by the time Thomas McDonnell reported to work on Monday morning, May 6, 1985. Thus, it seems clear to us that under § 161(a), complainant's agreement to the modification of the contract should be deemed to have been induced by respondent's innocent misrepresentation. The fact that the misrepresentation was material is so obvious as not to warrant discussion.

An analysis of paragraph (b) of § 161 yields a similar result. It is, of course, obvious that respondent, as an organization, knew that "disclosure of the fact [the May 3 inspection] would correct a mistake of the other party as to a basic assumption on which that party [was] making the contract [modification].. ." The question is whether "the non-disclosure of the fact amount[ed] to a failure to act in good faith and in accordance with reasonable standards of fair dealing." The Restatement, although it underscores in § 205 that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement," does not undertake to define good faith. Rather, the comments to § 205 refer us to the Uniform Commercial Code for the definition of good faith, and quote specifically U.C.C. § 1-201(19) as defining good faith as meaning "honesty in fact in the conduct or transaction concerned," and § 2-103(1)(b) as defining good faith in the case of a merchant as meaning "honesty in fact *and* the observance of reasonable commercial standards of fair dealing in the trade." (emphasis supplied) While we would certainly hesitate to characterize respondent's actions (even viewed as an organization) in this case as lacking "honesty in fact", respondent, as a merchant, was required to live up to a higher standard in order to meet the Code's definition of good faith. Respondent had also to observe "reasonable commercial standards of fair dealing in the trade." If a merchant knows that an arrival inspection of produce purchased by him shows good delivery, certainly reasonable standards of fair dealing in the trade do not allow him to negotiate a modification of the contract with the seller on the basis of a later inspection which seems to show a failure to make good delivery, without disclosing the existence of the earlier inspection. This would especially be true where the merchant had previously led the seller to believe that the later inspection would be the only inspection. We conclude that respondent's non-disclosure was the equivalent of an assertion under both paragraph (a) and (b) of § 161, and that since the assertion in question was not in accord with the facts,

> when one forgets to disclose a known fact, and it is then equivalent to an innocent misrepresentation....

In the present case there was a "previous assertion" that the lettuce would not be inspected on May 3, but would be inspected on May 6. When respondent's Thomas McDonnell communicated the results of the May 6 inspection on May 6, without revealing that there had been a May 3 inspection showing good delivery, such failure clearly amounted to a misrepresentation under § 161(a) if the fact in question was known to respondent. Thomas McDonnell claims that he personally did not know of the May 3 inspection on the morning of May 6 when he made his call. However, even if this claim is accepted, such personal knowledge was not necessary. This is shown by the comment to § 161(b) which also deals with the problem of knowledge:

> Actual knowledge is required for the application of the rule stated in Clause (b).... As to knowledge in the case of an organization, see the analogous rule in the Uniform Commercial Code § 1-201 (27).

Section 1-201(27) of the U.C.C. states in relevant part:

> ... knowledge ... received by an organization is effective for a particular transaction from the time when it is brought to the attention of the individual conducting that transaction, and in any event from the time when it would have been brought to his attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines. Due diligence does not require an individual acting for the organization to communicate information unless such communication is part of his regular duties or unless he has reason to know of the transaction and that the transaction would be materially affected by the information. (emphasis supplied)

First, it should be noted that respondent would have the burden of showing due diligence in maintaining reasonable routines under which the information concerning the May 3 inspection should have been conveyed to Thomas McDonnell. The record does not disclose any such showing. Second, respondent's president, James E. McDonnell, II; stated that the lettuce was shipped out by respondent to chain stores on the evening of May 3, 1985, because the federal inspection on May 3 showed good delivery. Respondent's president emphasized that the chain store customers were requiring arrival inspections showing good delivery prior to shipment to them due to then current problems with Arizona lettuce. When Thomas McDonnell left respondent's office sick on the afternoon of May 3, the handling of the lettuce was taken over by Stephen E. Green. Because of the good results of the May 3 inspection, Mr. Green shipped the lettuce out to the chain stores. Mr. Green was a person acting for the organization who clearly "knew of

good delivery. The May 6 inspection was a restricted inspection, and was made nearly three days following arrival. Condition factors were severe enough to indicate to complainant a probability that the lettuce had not made good delivery when it arrived on May 3, 1985. Though complainant contends that it did not do so, we have found, based largely on the broker's testimony, that complainant agreed on May 6 to a modification of the contract under which the lettuce would be handled on a consignment basis by respondent.

The issue of whether the parties' May 6, 1985, contract modification should be set aside may be approached either under the category of misrepresentation or the category of mistake. Both of these subjects are treated very carefully and in a systematic fashion in the Restatement (Second) of Contracts §§ 151–173. We will deal first with the question of whether the contract modification was induced by a misrepresentation.

The Restatement (Second) of Contracts, § 159, defines misrepresentation as follows: "A misrepresentation is an assertion that is not in accord with the facts." Section 161 gives the rules for determining when non-disclosure is equivalent to an assertion. This section states in relevant part as follows:

> A person's non-disclosure of a fact known to him is equivalent to an assertion that the fact does not exist in the following cases only:
>
> (a) where he knows that disclosure of the fact is necessary to prevent some previous assertion from being a misrepresentation or from being fraudulent or material.
>
> (b) Where he knows that disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making the contract and if non-disclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing. ..

Section 164(1) states that "If a party's manifestation of assent is induced by either a fraudulent *or* a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient." (emphasis supplied) Thus, since a "misrepresentation is an assertion. . .", if a non-disclosure can overcome the hurdle of being the equivalent of an assertion under § 161, the "misrepresentation" need only be material, and does not necessarily have to be deemed fraudulent. This is further explained in the comment on § 161(a):

> In order to make the contract voidable under the rule stated in § 164(1), the non-disclosure must be either fraudulent or material. The notion of disclosure necessarily implied that the fact in question is known to the person expected to disclose it. But the failure to disclose the fact may be unintentional, as

age by tip burn. Decay from 1to 5 heads in most cartons, many none, average 8% Gray Mold Rot and Bacterial Soft Rot in various stages and mostly following tip burn.

7. The results of this federal inspection were communicated by Mr. McDonnell, through the broker, to complainant on the morning of May 6, 1985; however, neither the results nor the fact of the May 3, 1985, federal inspection was communicated to complainant. On the basis of the May 6, inspection the parties agreed that respondent could handle the lettuce for complainant's account.

8. No part of the purchase price of the lettuce has been paid by respondent to complainant.

9. An informal complaint was filed on June 20, 1985, which was within nine months after the cause of action herein accrued

Conclusions

Respondent urges that the rejection of the lettuce on the afternoon of May 3, 1985, by the chain stores, and the federal inspection on May 6, 1985, show a breach of contract on the part of complainant. We do not agree. The regulations provide that in an f.o.b. sale a warranty of suitable shipping condition applies to perishable produce. This warranty is an extension of the common law warranty of merchantability applicable only at shipping point. See *Harvest Fresh Produce, Inc. v. Clark-Ehre Produce Co.* , 39 Agric. Dec. 703 (1980). The suitable shipping condition warranty requires that produce be loaded for transportation in such a condition that, if the shipment is handled under normal transportation service and conditions, delivery will be made without abnormal deterioration at the contract destination agreed upon between the parties. This is otherwise referred to as "good delivery." 7 C.F.R § 46.43(j). The regulations provide specific good delivery standards for lettuce. The federal inspection on May 3, 1985, shows that the subject lettuce clearly made good delivery under the applicable good delivery standards. See 7 C.F.R. § 46.44(2).

Respondent additionally contends that complainant agreed to a modification of the original contract (subsequent to the May 3 price modification) to call for a consignment of the lettuce after hearing the results of the May 6 federal inspection. This contention raises the question of the effect of respondent's non-disclosure, at the time of the modification, of the previous May 3 inspection showing good delivery.

The May 3, 1985, federal inspection of the lettuce was unrestricted and was made only one hour after arrival of the lettuce. Such inspection clearly shows that there was no breach of contract on the part of complainant. On May 3, 1983, complainant was told through the broker only that there was trouble with the lettuce, that a federal inspection had been called for, and that such inspection would not take place until May 6, 1985. On May 6,1985, complainant was informed of the second federal inspection, but not of the May 3 inspection showing

Findings of Fact

1. Complainant, Nalbandian Farms, Inc. , is a corporation whose address is P.O. Box 845, Glen Dale, Arizona.

2. Respondent, McDonnell & Blankfard, Inc., is a corporation whose address is Maryland Wholesale Produce Market, Building 5, Units 57-63, Jessup, Maryland. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about April 29, 1985, complainant sold to respondent, and shipped from loading point in Arizona to respondent in Jessup, Maryland, 896 cartons of "Your Kind" brand lettuce at $6.00 per carton, plus $.70 per carton for cooling, $.15 per carton for brokerage, and $22.50 for a Ryan temperature recorder, or $6,060.10, f.o.b. The contract was negotiated through Davidson Distributing of Salinas, California acting as broker.

4. On May 3, 1985, the parties negotiated a reduction in price of $1.00 per carton based on market decline. At 1 p.m. on May 3, 1985, the lettuce arrived at respondent's place of business and respondent's purchasing agent, Thomas M. McDonnell, called for a federal inspection. At that time he was told by the federal inspection office that an inspector would not be available to inspect the lettuce on that date. Mr. McDonald then called the broker and reported trouble on the load of lettuce, and that a federal inspection had been called for but would not be made until Monday, May 6, 1985. The broker conveyed this message promptly to complainant. Shortly thereafter Mr. McDonnell left respondent's place of business because of illness. A federal inspector arrived at 2 p.m. on May 3, 1985, and proceeded to inspect the 896 cartons of lettuce after they had been unloaded into respondent's cooler. Such inspection showed temperatures of 41 to 43° and condition as follows:

> Generally fresh and crisp. Wrapper leaves: Decay averages 2%. Head leaves: From 1 to 4 heads per carton, average 10% damage by tip burn. Decay averages 2% Gray Mold Rot in various stages.

5. After receiving the results of the federal inspection on the afternoon of May 3, 1985, respondent's salesman, Steven E. Green, distributed the lettuce to two chain stores in the area. These chain stores rejected the lettuce to respondent on the same afternoon, and the lettuce was brought back to respondent's cooler.

6. At 7 a.m. on Monday morning, May 6, 1985, 574 cartons of the lettuce were again federally inspected in respondent's cooler. Such inspection showed that temperatures ranged from 40 to 41°, and disclosed the condition to be as follows:

> Generally fresh and crisp. Wrapper leaves: decay average 2%. Head leaves: from 1 to 10 heads per carton, average 20% dam-

PACA Docket No. 2-7014

Decision and order filed April 24, 1987.

F.O.B., suitable shipping condition warranty—Misrepresentation—Mistake

Upon arrival at 1:00 p.m. on Friday of a load of lettuce respondent's buyer called for a Federal Inspection and was told that none would be available until Monday The employee then communicated to complainant that the lettuce had arrived showing trouble and a Federal Inspection had been requested but would not be available until Monday. The employee then went home sick. A Federal Inspector finished his other work early and inspected the lettuce at 2:00 p.m. on Friday The inspection showed that the lettuce made good delivery and on the basis of such inspection respondent's salesman sent lettuce to respondent's customers who later returned it as unacceptable. On Monday respondent's buyer returned to work, had a portion of the lettuce Federally inspected, and reported the results to complainant without disclosing that the lettuce had been inspected on Friday. The Monday inspection showed sufficient damage to warrant a conclusion that the lettuce did not make good delivery, and on the basis of such inspection the parties agreed to a modification of the contract. It was held on the basis of the Friday inspection, that the lettuce made good delivery and that the contract modification could be set aside on both the ground of misrepresentation and mistake. Complainant was awarded contract price.

Thomas R. Oliveri, for complainant.

Respondent, pro se.

George S. Whitten, presiding officer.

Decision issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a et seq.). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $5,264.00 in connection with the shipment in interstate commerce of a truckload of lettuce.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, respondent filed an answering statement, and complainant filed a statement in reply. Both parties filed briefs.

6. A formal complaint was received by the Department on February 25, 1985, which was within nine months of accrual of the cause of action alleged therein.

Conclusions

It is undisputed that respondent purchased the potatoes from complainant in interstate commerce, received them, accepted them, and only $1,000.00 of the price of them remains unpaid and in dispute. Respondent contends that much of the produce was spoiled. Complainant must prevail on the basis of the record.

The record contains a December 3, 1984 letter of respondent which is not verified, by oath or otherwise. The only evidence which respondent supplied, of the condition of the potatoes, is the following language in the verified answer:

> 4. That much of the aforementioned purchase was spoiled and was inadvertently sold by respondent to his customers, and that upon becoming aware of the spoiled condition of the produce he adjusted the sales price to his customers and gave credit therefor in the amount of, to-wit: $1,000.

After that answer was served on complainant, it filed a verified "counterclaim answer" containing the following:

> 4. Denies Respondent made no protest at the time of purchase or delivery. Respondent and or receiving agent signed each delivery, accepting the produce as provided * * *

Both these documents are verified by oath, but neither recites that the person who signed it ever saw any of the potatoes. The record contains no other evidence of the condition of the potatoes upon delivery. This evidence is inconclusive and proves nothing as to the condition of the potatoes on delivery.

It is undisputed that the potatoes were accepted by respondent when delivered. The burden is on the buyer to establish any breach with respect to goods accepted. *Theron Hooker Co. v. Ben Gatz, Co.*, 30 Ag. Dec. 1109 (1971). See also U.C.C. §2-607(1) & (4).

On the basis of the above, respondent's failure to pay in full for the potatoes is found to be a violation of Section 2(4) of the Act, 7 U.S.C. 499b(4), for which reparation should be awarded with interest.

Order

Within 30 days of the date of this order, respondent shall pay to complainant as reparation $1,000.00 with interest thereon at the rate of 13% per annum from October 1, 1984 until paid.

Copies of this order shall be served on the parties.

NALBANDIAN FARMS, INC. v. McDONNELL & BLANKFARD, INC.

Evidence in record was held not sufficient to establish that potatoes were spoiled as alleged by respondent buyer. Thus buyer's failure to pay in full for them was held violative of the Act.

John J. Casey, Presiding Officer.

Complainant, pro se.

Elliott R. Perlman, for respondent.

Decision and order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended, 7 U.S.C. 499a *et seq.* A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $2,589.25 in connection with eight shipments of potatoes in interstate commerce.

A copy of the report of investigation prepared by the Department was served on each party. A copy of the formal complaint was served on respondent, who filed an answer thereto, admitting liability to complainant for all but $1,000.00 of the amount claimed.

On August 26, 1985, an order was issued, which was amended on September 27, that respondent pay the undisputed amount. Thereafter complainant filed a reply to the answer.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice, 7 C.F.R. § 47.20, is applicable. Pursuant to that procedure, the report of investigation is considered a part of the evidence, as are the verified complaint, answer, and reply. Each party was given notice of opportunity to submit additional evidence in the form of verified statements, and to file briefs, but nothing was received in response to those notices.

Findings of Fact

1. Complainant at all times material herein was a corporation with a place of business at Southgate, Michigan and licensed under the Act.

2. Respondent at all times material herein was an individual with a place of business at Detroit, Michigan, and operating subject to license requirements under the Act.

3. In eight trucklots between August 20 and September 17, 1984, respondent received potatoes in interstate commerce sold to him by complainant, at various prices, for a total of $2,736.25. Respondent accepted all upon delivery.

4. On September 27, 1984 respondent returned to complainant four boxes it had purchased at $7.00, and 14 boxes it had purchased at $8.50, for which complainant gave credit of a total of $147.00, leaving $2,589.25 unpaid.

5. Respondent has previously been ordered to pay complainant $1,589.25 which he admitted was due, leaving $1,000.00 in dispute.

Corp." and the "Matrix Marketing, Inc." are one and the same entities, or that either one was the Matrix Marketing referred to in the complaint. All the invoices show they were addressed to Matrix Marketing Division of J. Livacich in Stockton, California. The check respondent submits as evidence that Matrix Marketing Corp. was a Nevada corporation and which was apparently paid to complainant has no supporting invoice to show whether the invoice was sent to J. Livacich's Stockton, California address, as were the invoices at issue. However, from the order number shown on the left side of the check, Order No. 70163, and its numerical proximity with the first invoice presented by complainant in evidence (Exhibit 2) which had invoice no. 70165, we infer this was another of complainant's invoices which went to respondent's Stockton address, but which was eventually paid for by the Matrix Marketing check. Such a situation only lends further credibility to complainant's evidence since the invoice could not get from J. Livacich in Stockton, California, to Matrix Marketing in Nevada, if the firms were not related or affiliated.

Had respondent's answer been filed by an attorney, it would have been unethical, unprofessional and improper for the attorney to make spurious defenses. Respondent's representative, however, has not identified herself as an attorney and may be unaware of the necessity of presenting the facts with forthrightness and veracity to this forum in her argument of the case. This is to inform her and others who come after her that an advocate's ability to persuade is not assisted by spurious defenses which diminish the credibility of the advocate.

We hold, therefore, that respondent's failure to pay complainant the $47,003.90 is a violation of section 2 of the Act for which reparation, plus interest, should be awarded.

Order

Within thirty (30) days from the date of this order, respondent shall pay to complainant, $47,003.90, with interest thereon, at the rate of 13 percent per annum from December 1, 1985, until paid.

Copies of this order shall be served on the parties .

METRO PRODUCE, INC. v. SALVATORE (SAM) WILLIAM TOCCO d/b/a TOCCO PRODUCE NO. 1.

PACA Docket No. 2-6882.

Decision and order issued April 13, 1987.

Buyer has burden to establish any breach with respect to goods accepted.

> This letter, in addition to informing your company of the aforementioned notice, is to also assure the trade that ALL purchases made by Matrix Marketing will be obligated in accordance with negotiated terms of sale. In order to obligate these purchases in a timely fashion, please forward any unpaid invoices to this office. Our intentions are to promptly review and settle all outstanding accounts.
>
> Additionally, take further notice that the employees and/or agents that were connected with Matrix Marketing are no longer associated or connected with John Livacich Produce, Inc., subsidiaries or affiliates.

It is obvious from the letter, which respondent did not deny, that there was a connection, affiliation and relation between Matrix Marketing and John Livacich Produce, Inc. Irrespective of the exact terms of the relationship, by the letter of October 18, 1985, John Livacich Produce, Inc., obligated itself for the debts of Matrix Marketing (non-Inc.) which were lawfully incurred by that entity prior to October 18, 1985. The transactions here involved, with one exception, in which a balance of $47,003.90 remains unpaid, were ordered prior to that date. The one exception is the transaction of October 18th. Since the letter was dated October 18, 1985, only if complainant had actual or constructive notice of the facts contained in the letter could respondent claim the facts were known to complainant prior to the contract being entered into. Respondent presented no evidence to show complainant knew this information prior to the date the contract was entered. The evidence shows the produce was ordered and shipped, received and accepted by respondent. The respondent is, therefore, obligated to complainant for the full contract price less damages sustained as a result of any breach of contract by complainant, and less credit for money paid and any allowance due it. *Rocky Ford Dist. Co. v. Angel Produce*, 29 Agric. Dec. 93 (1970). The full contract price for the eight loads of fruit was $63,023.90. The complainant agreed to credits of $16,020. 00, as a result of condition defects which were detected upon inspection prior to shipment or after arrival. Respondent presented no further evidence of any credits due.

Respondent's answer constitutes an attempt to play "dumb" with the facts as well as treating this tribunal as a "fool". The complaint was filed against Matrix Marketing Division of John Livacich Produce, Inc., and dealt with that entity as it was so constituted during the period from September 26, 1985, through October 18, 1985. The evidence clearly indicated that during that period Matrix Marketing and John Livacich Produce, Inc., had some sort of relationship and affiliation.

Respondent's answer referred to Matrix Marketing, Inc., an entity as to which respondent presented no evidence into the record. Respondent did present evidence relating to a Matrix Marketing Corp., a Nevada corporation, but there is no evidence that the "Matrix Marketing

by complainant. Respondent received and accepted the mixed fruit. A balance of $6,820.50 remained unpaid.

8. On or about October 3, 1985, complainant, by oral contract, sold respondent 1560 lugs of Thompson seedless grapes, Sunfruit brand, at $4.85 per lug, plus 1560 units cooling and pallets at 70¢ and one unit Ryan # 446505 at $22.50, for a total invoice value of $8,680.50. These grapes were loaded at Madera, California, and destined for New York, New York. On October 9, 1985, shortly after arrival, the grapes were inspected. As a result of condition defects, a credit of $3,120.00 was agreed upon and given by complainant, and the grapes were received and accepted by respondent. A balance of $5,560.50 remained due on this transaction.

9. On or about October 11, 1985, complainant, by oral contract, sold respondent 42 of cartons MZ Red Delicious apples, 125's, at $9.80 per carton; 42 cartons of MZ Red Delicious apples, 64's, at $13.80 per carton; 1 carton of Red Delicious apples, 138's, at no charge; plus freight at $102.00 and 84 pallets at 15¢, for a total invoice value of $1,105.80. These commodities were loaded at Yakima, Washington, and were destined for Stockton, California. The fruit was received and accepted by respondent.

10. On or about October 18, 1985, complainant, by oral contract, sold respondent 50 cartons of Choice Moon Glo lemons, 140's, at $14.90 per carton; 20 cartons of Choice Crystal lemons, 165's, at $14.90 per carton;10 cartons of Choice Springs lemons at $12.90 per carton; for a total invoice value of $1,172.00. These lemons were loaded at Yuma, Arizona, and were destined for Stockton, California. The fruit was received and accepted by respondent.

11. The transactions set forth in paragraphs 3–10 were f.o.b. transactions

12. A formal complaint was filed on February 4, 1986, which was within nine months of when the causes of action stated herein accrued.

Conclusions

Respondent's answer denies any knowledge of the transactions and denies owing complain any sums of money, claiming that the contract was with Matrix Marketing, Inc., a Nevada corporation, ostensibly unrelated to respondent. To respondent's claims, complainant submits verified evidence, the most telling of which is a computer generated letter from John Livacich Prodwce, Inc., of San Bernardino, California, dated October 18, 1985, signed by John Livacich, President. Said letter states, in relevant portion:

> Please take notice that effective October 18, 1985 Matrix Marketing, Stockton, California, has ceased operations and has been officially discontinued.

September 26, 1985, the grapes were inspected at Sanger, California, and graded U.S. #1. The fruit was received and accepted by respondent.

4. On September 26, 1985, complainant, by oral contract, sold respondent a second load of 1620 lugs of Tokay grapes, Cando brand, at $4.85 per lug, plus 1620 units cooling and pallets at no charge, and one unit Ryan #328622 at $22.50 for a total invoice value of $7,879.50. These grapes were loaded at Lodi, California, and were destined for Puerto Rico. On September 26, 1985, the grapes were inspected at Sanger, California, and graded U.S. #1. The fruit was received and accepted by respondent.

5. On or about September 30, 1985, complainant, by oral contract, sold. Respondent 1380 lugs of Roysum plums, 3x4x5 sizes, at $7.85 per lug, plus1380 units cooling and pallets at 70¢ and one unit Ryan # 392244 at $22.50 for a total invoice value of $11,821.50. These plums were loaded at Reedley, California, and were destined for Puerto Rico. On September 30,1985, prior to shipment, the plums were inspected at Reedley, California, which inspection indicated some defects. As a result of the condition defects, a credit of $5,520.00 was agreed upon by the parties, leaving a current invoice value of $6,031.50. The fruit was received and accepted by respondent.

6. On or about October 1, 1985, complainant, by oral contract, sold respondent 600 lugs of Roysum plums, 4x4's, at $11.85 per lug; 648 lugs Lakewood Bartlett pears, 100's, at $9.85 per lug; 54 lugs Lakewood Bartlett pears, 110's, at $8.85 per lug; plus 1302 units cooling and pallets at 70¢ and one unit Ryan # 468279 at $22.50, for a total invoice value of $14,904.60. These commodities were loaded at Reedley, California, and were destined for New York, New York. On October 7, 1985, shortly after arrival, these plums were inspected at respondent's request, which inspection indicated some defects. As a result of the condition defects, a credit of $4,620.00 was agreed upon by the parties, leaving a current invoice value of $10,284.60. The fruit was received and accepted by the respondent.

7. On or about October 1, 1985, complainant, by oral contract, sold respondent 1260 lugs of Thompson seedless grapes, Sun D brand, at $4.85 per lug; 120 lugs of Thompson seedless grapes, Sunfruit brand, at $4.85 per lug; 60 lugs of Wonderful Sun D brand pomegranates, 24's, at $9.85 per lug; 60 lugs of Wonderful Sun D brand pomegranates, 30's, at $9.85 per lug; and 60 lugs of Wonderful Sun D brand pomegranates, 36's, at $9.85 per lug; plus 1560 units cooling and pallets at 70¢ and one unit Ryan #479904 at $22.50 for a total invoice price of $9,580.50. The commodities were loaded at Madera, California, and destined for New York, New York. On October 7, 1985, shortly after arrival, the seedless grapes were inspected, and as a result of condition defects, a credit of $2,760.00 was agreed upon and given

Complainant, pro se.

Respondent, pro se.

Decision issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. § 499a et seq.). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $47,003.90, the balance due in connection with seven (7) transactions in interstate commerce involving various produce.

A copy of the formal complaint was served upon respondent and a copy of the report of investigation prepared by the Department was served on both parties. respondent filed a verified answer to the complaint, generally denying the allegations of the complaint, denying any knowledge of Matrix Marketing, Inc. , and raising five affirmative defenses.

Although the amount claimed as damages exceeds $15,000. 00, neither party requested an oral hearing. Therefore, since section 47. 15 of the rules of practice (7 C.F. R. § 47. 15) provides that failure to request an oral hearing constitutes a waiver of hearing and an agreed amount that the proceeding may be received under shortened procedure, the shortened method of procedure provided L? section 47.20 of the Rules of Practice (7 C .F.R. § 47.20) was followed. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence in the case, as the Department's report of investigation. In addition, the parties were given the opportunity to submit further evidence by way of verified statements. Complainant filed a verified statement which included a purported letter from John Livacich, President of John Livacich Produce, Inc., dated October 18, 1985. Respondent filed no additional evidence, but did file a brief.

Findings of Fact

1. Complainant, Mendelson-Zeller Co., Inc., is a corporation whose mailing address is 450 Sansome Street, Suite 1400, San Francisco, California 94111.

2. Respondent, John Livacich Produce, Inc., is a corporation also trading as Matrix Marketing, whose mailing address is Post Office Box 5519, San Bernadino, California 98412. At the time of the transactions involved herein, respondent was licensed under the Act.

3. On or about September 26, 1985, complainant, by oral contract, sold respondent 1620 lugs of Tokay grapes, Cando brand, at $4.85 per lug, plus 1620 units cooling and pallets at no charge, and one unit Ryan # 430867 at $22.50 for a total invoice value of $7,879.50. These grapes were loaded at Lodi, California, and were destined for Puerto Rico. On

Respondent is not allowed the $42.00 credit taken for the inspection fee. Such inspection is at the expense of the party requesting it. *Monc's Consolidated v. United Fruit & Prod.*, 32 Ag. Dec. 2006 (1973).

Recapitulating the above:

first shipment:			
price:		$8, 539.85	
paid by respondent:		(8,517.35)	
shortage:			22.50
second shipment:			
price:		9,105.00	
labor:	(1,683.49)		
loss (131 X $9.50):	(1,244.50)		
		(2,927.99)	
shortage:			6,177.01
total shortage:			6,199.51

On the basis of the above, respondent's failure to pay in full for the potatoes is found to be a violation of Section 2(4) of the Act, 7 U.S.C. 499b(4), for which reparation should be awarded with interest.

Order

Within 30 days of the date of this order, respondent shall pay to complainant as reparation $6,199.51 with interest thereon at the rate of 13%per annum from June 1, 1984 until paid.

Copies of this order shall be served on the parties.

MENDELSON-ZELLER CO., INC. v. MATRIX MARKETING DIVISION OF JOHN LIVACICH, INC.

PACA Docket No. 2-7232.

Decision and order issued April 10, 1987.

Verified evidence of company relationship rebuts denial of relationship by respondent—Respondent's credibility and persuasiveness not assisted by spurious defenses.

Respondent, a division of a larger corporation purchased various loads of fruit. Failed to pay, went out of business. Letter of parent company sent in which parent company obligated itself for purchases of respondent. Respondent, the parent company, denied any liability or connection. Complainant awarded reparation per complaint amount.

Allan R. Kahan, presiding officer.

Complainant must prevail on the basis of the facts which are undisputed as shown above, and the evidence in the record of the case.

As to the first shipment, the evidence in support of respondent's contentions, that it was defective, and that the $3,500.00 adjustment was agreed upon for it, was not sufficient to establish their merit. Respondent's resale of those potatoes without communicating a notice of rejection amounted to acceptance, and the burden is on a buyer to establish any breach with respect to goods accepted. *Theron Hooker Co. v. BenGatz Co.*, 30 Ag. Dec. 1109 (1971). See also U.C.C. §§ 2-602(1), 2-606(1)(b), and 2-607(1) & (4). As to the second shipment, the only evidence of respondent's loss and labor shows a different amount from what was taken.

Respondent contended that the first shipment was defective. The only evidence of this is a statement in the answer, That is verified by oath, but it gives no details about the alleged defects, and does not show that the person who signed it ever saw the potatoes. On that basis, it is not persuasive. Respondent also contended that Cherry Farms, Inc. as agent for complainant agreed to a $3,500.00 adjustment on the first shipment. In support of this contention, respondent attached to the answer what appears to be a letter on the letterhead of Cherry Farms, Inc., signed Don Youngblood. That letter not only fails to support that contention, but clearly denies that there was any such agreement.

As to the amount of respondent's loss and labor on the second shipment, the investigation report recites the following:

> Respondent maintains an original entry repacking record which shows the shipment was repacked on April 18, 1984 with 298 sacks being lost during regrading, labor expenses of $1,683.49. New 10 lb. and 100 lb. bags were used at an expense of $350.08 resulting in total regrading expenses of $4,864.50.
>
> Respondent did not obtain a USDA dumping certificate or other suitable evidence as required by the Act to support their alleged loss of 298 sacks. The USDA inspection shows 11 percent serious damage by external defects. The 4 percent internal defects cannot be allowed as a loss during the regrading process. Eleven percent times 1,190 sacks results in 131 packages which can be supported as loss by USDA inspection. The USDA inspection does not show damaged or wet bags which would require new bags during regrading. * * *
>
> Respondent's labor charge is in line with other dealers contacted in the Dallas area with capabilities of regrading potatoes.

Under the rules of practice the investigation report is treated as evidence subject to the parties' opportunity to produce evidence to refute it. The parties were given that opportunity, and did not produce such evidence. Thus we take the above facts shown in the report as true.

6. Respondent's loss of potatoes in the second shipment amounted to 11%, or 131 of the 1,190 bags.

7. An informal complaint was received by the Department on July 9, 1984, which was within nine months of accrual of the cause of action alleged therein.

Conclusions

On March 6, 1984, complainant through Cherry Farms, Inc., Macdoel, California, sold respondent a carload of no. 2 potatoes in 100 pound sacks at two different prices per cwt., for a total price of $8,S39,8S delivered at Dallas, Texas. The potatoes were shipped from Grenada, California to Dallas in car SPFE 4S1327. Respondent sold the potatoes to another buyer without inspecting them or communicating to complainant any notice of rejection of them.

On April 3, 1984, complainant, again through Cherry Farms, Inc. , sold respondent another carload of no. 2 potatoes, consisting of 1,190 sacks of 100 pounds each, at $9.SO per cwt., less an allowance of $2,200.00 for freight, for a net total price of $9,105.00 delivered at Dallas. These potatoes also were shipped from Grenada to Dallas, in car SPFE 456140. They were federally inspected upon arrival at Dallas, and failed to grade U.S. No. 2 on account of condition. Respondent promptly communicated a notice of rejection to Cherry Farms, Inc. who as agent for complainant gave protection for loss and labor on them.

Respondent issued two checks in payment for the two shipments, one on April 18 for the second shipment, and the other after that for the first shipment. The date of the second check, for the first shipment, is shown as April 19 in the verified complaint, and as April 26 in Exhibit 1 to the verified answer. The check for the first shipment, the second check, was for $8,517.35. The check for the second shipment, the first check, was for $684.00, reflecting a reduction in price per cwt. from $9.50 to $5.40, and deductions of $3,500.00 for "credit on car # SPFE 451327," and $42.00 for "USDA inspection." Thus $3,500 was deducted for the first shipment, but was reflected in the amount of the check for the second shipment.

This much is undisputed. The record is unclear as to the relationship of complainant and Cherry Farms, Inc., particularly since complainant filed the claim although Cherry Farms, Inc. shipped the potatoes and gave protection for loss and labor on the second shipment. However, no issue was raised about the relationship between them, so we take it as undisputed that Cherry Farms, Inc. acted as agent for complainant in the transactions in dispute.

Respondent contended that the first shipment was defective as to quality and condition, and that Cherry Farms, Inc. as agent for complainant agreed to a $3,5OO.00 adjustment on the first shipment at the time when it agreed upon protection for loss and labor on the second.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended, 7 U.S.C. 499a *et seq.* A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $7,421.51 in connection with two shipments of potatoes in interstate commerce.

A copy of the report of investigation prepared by the Department was served on each party. A copy of the formal complaint was served on respondent,which filed an answer thereto, denying liability. Respondent also filed a supplemental answer, and complainant filed a reply thereto.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice, 7C.F.R. §47.20, is applicable. Pursuant to that procedure, the report of investigation is considered a part of the evidence, as are the verified complaint and answer. Each party was given notice of opportunity to submit additional evidence in the form of verified statements, and to file briefs,but nothing was received in response to those notices.

Findings of Fact

1. Complainant at all times material herein was a corporation with a place of business in Paul, Idaho and licensed under the Act.

2. Respondent at all times material herein was a corporation with a place of business in Dallas, Texas and licensed under the Act.

3. On March 6, 1984, a carload of no. 2 potatoes was sold by complainant to respondent at two different prices per cwt., for a total price of $8,539.85 delivered at Dallas, Texas. The potatoes were shipped from Cherry Farms, Inc., Grenada, California to Dallas. No notice of rejection of them was communicated by respondent to complainant. Respondent paid complainant $8,517.3S for this load.

4. On April 3, 1984, another carload of no. 2 potatoes was sold by complainant to respondent, consisting of 1,190 sacks of 100 pounds each, at $9.SO per cwt., less an allowance of $2,200.00 for freight, for a net total price of $9,105.00 delivered at Dallas, Texas. These potatoes also were shipped from Cherry Farms, Inc. , Grenada, California to Dallas. They were federally inspected at Dallas, and failed to grade U.S. No. 2 on account of condition. Respondent promptly communicated a notice of rejection to Cherry Farms, Inc., who as agent for complainant gave respondent protection for loss and labor on them. For this load, respondent issued;complainant a check for $684.00 which was never negotiated.

5. Respondent's labor made necessary by the failure of the second. Shipment to grade U.S. No. 2 amounted to $1,683.49.

(Complainant's Exhibits 1, 2 to the complaint) Respondent's only defense was that it filed an assignment for the benefit of creditors under Maryland law.

Such assignments, however, do not provide a defense in reparation proceedings. *Arbittier Farms v. Top Banana Farmers Market, Inc.*, 42 Agric. Dec. 1272 (1983); *Fruit Salad, Inc. v. M. Egan Co., Inc.*, 42 Agric. Dec. 664 (1983). They do not cut off the rights of parties to proceed before the Secretary in reparation proceedings. Furthermore, a reparation order has effects not attendant to any other proceeding. For example, failure to pay a reparation award results in sanctions against licensees, and those individuals responsibly connected with corporate licensees. *See*, 7 U.S.C. §§ 499g, h.

There is no indication in the record that respondent did other than accept the apples in interstate commerce. Nor is there any evidence that there has been any payment to complainant by respondent or respondent's assignee. Respondent is therefore liable to complainant for the full purchase price of the apples, or $3,150.00. The failure of respondent to pay this amount to complainant is a violation of section 2 of the Act for which reparation should be awarded to the complainant with interest.

Order

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $3,150.00, with interest thereon at the rate of 13 percent per annum from May 1, 1986, until paid.

Copies hereof shall be served upon the parties.

MAGIC VALLEY POTATO SHIPPERS, INC., v. CENTRAL PRIDE PAK, INC.

PACA Docket 2-6996

Decision and order filed April 13, 1987.

Resale of potatoes without communicating rejection—Buyer has burden to establish breach—Statement that potatoes were defective not persuasive, where no details given about alleged defects—Facts discovered by investigation, taken as established—Inspection of potatoes at expense of party requesting it—Failure to pay in full for potatoes.

Licensee's failure to pay in full for potatoes purchased in interstate commerce found in violation of Section 2(4) of Act, on basis of undisputed facts, and evidence in record.

John J. Casey, presiding officer.

Complainant, pro se.

L.W. Anderson, Dallas, Texas, for respondent.

Decision issued by Donald A. Campbell, Judicial Officer.

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant sought award of reparation in the amount of $3,150.00 in connection with the sale of apples in interstate commerce.

Copies of the report of investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent. On October 6, 1986, respondent's assignee filed what it styled "Answer to Complaint and Suggestion of Insolvency" in which the assignee asserted that respondent made a general assignment of all its assets to him and that he had no particular knowledge of the facts alleged in the complaint and therefore could neither admit nor deny the allegations of the complaint. The assignee also moved that this reparation proceeding be stayed pending a final accounting and distribution of respondent's assets. Respondent's motion was denied on November 7, 1986, on the basis that there is no provision in Maryland state law or federal law requiring that federal administrative proceedings be stayed because of the filing of an assignment for the benefit of creditors.

Since the amount claimed in damages does not exceed $15,000.00, the shortened procedure provided in Section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) applies. Under this procedure, the verified complaint of the complainant as well as the Department's report of investigation are part of the evidence in the case. Respondent's answer, because it was unverified, is not part of the evidence. Additionally, both parties were given the opportunity to file evidence in form of verified statements. Neither party did so. Neither party filed a brief.

Findings of Fact

1. Complainant Ludington Fruit Exchange, Inc., is a corporation whose post office address is 5130 South Pere Marquette Road, Ludington, Michigan 49431.

2. Respondent B.G. Marketing Company is a corporation whose address is P. O. Box 649, Hagerstown, Maryland 21741. At the time of the transactions involved herein, respondent was licensed under the Act.

3. On or about March 24, 1986, complainant sold apples in interstate commerce to respondent in the total amount of $3,150.00.

4. Respondent received and accepted the produce, but has paid nothing with respect to any of the transactions.

5. The complaint was filed on June 19, 1986, which was within nine months of the time the cause of action herein arose.

Conclusions

Complainant has made a prima facie showing in this case that it shipped the apples in question at a total invoice price of $3,150.00.

> of consigned or jointed shipments and sales through brokers, auctions, and status all of claims filed with or collected from the carriers. The agent shall prepare and maintain full and complete records of all details of such distribution to provide supporting evidence for the accounting. 7 C.F.R. § 46.32(b).

In view of the late notice to complainant and the lack of information given as to the nature of and status of the complaints which respondent claims to have filed on some of the lots of tomatoes, we cannot conclude that respondent has offered an adequate defense to complainant's claim herein. However, even if we did accept respondent's meager offerings in this regard, respondent's statements as to the remaining lots, that it had "negotiated the difference," without stating what amounts were realized from such negotiations, or indicating why such negotiations were necessary in the first place, render it impossible for us to find for respondent. We conclude that respondent is liable to complainant for the market price at time of shipment, which is reflected by the amounts shown on the grower's pack-out sheets, less packing and commission charges, and less the $11,847.20 already paid, or a net amount of $22,755.75. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

Order

Within 30 days from the date of this order respondent shall pay to complainant, as reparation, $22,755.75, with interest thereon at the rate of 10 percent annum from February 1, 1985, until paid.

LUDINGTON FRUIT EXCHANGE, INC. v. B. G. MARKETING COMPANY

PACA Docket No. 2-7343

Decision and order filed April 29, 1987.

Assignment for benefit of creditors—Failure to pay.

Where complainant alleging failure to pay for produce contains invoices and bills of lading showing respondent received the produce, complainant has established a prima facie case and is entitled to reparation award where respondent's only defense is that it made an assignment of assets for the benefit of creditors under state law. Such assignments do not bar the reparations proceeding.

Peter V. Train, presiding officer.

Complainant, pro se.

Roger Schlossberg, Hagerstown, Maryland, for respondent.

Decision issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

for packing charges and commission, leaving a net amount due complainant on all the lots of $34,602.95. Respondent has paid complainant $11,847.20 of this amount.

4. The formal complaint was filed on July 8, 1985, which was within nine months after the cause of action arose.

Conclusions

Complainant alleges that a balance of $22,755.75 is due from respondent on the basis of a sale of the tomatoes to respondent. However, in the informal complaint complainant referred to Whizpac, Inc., as "Pack, Sell and Ship Brokers," and alleged that Whizpac had entered into a verbal agreement with complainant to "pack, sell and ship my tomatoes at specific prices at market prices for that day." Moreover, the only documents issued relative to the tomatoes were issued by respondent to complainant, and are denominated "Growers Pack-Out Sheet." These documents show the number of cartons for each size and quality category, together with price and a packing and commission charge. At the bottom of each sheet is the net figure due the grower. All of this indicates a grower's agent relationship rather than a sale to respondent, and this is in accord with what is alleged by respondent in its answer. However, there is nothing in the record to show that respondent entered into the written grower's agent contract, or that it sent complainant the alternative "written statement describing the terms under which he will handle the produce of the grower," as required by the regulations. See 7 C.F.R. § 46.32(a).

Complainant asserts that it received no notice from respondent, until four or five weeks following shipment of the tomatoes, that the price on the pack-out sheets would not be received. Notice, when received, was in the form of copies of "Growers Pack-Out Sheets" with the original prices stricken out, and a new and lower price inserted. However, as to three lots totaling $10,350.25, prior to the filing of the answer, the record discloses no payment or notice as to why payment was not made. The answer merely states that one of these lots had been collected, and that as to the others, claims had been filed against the buyers, one of which was alleged to be in bankruptcy.

As to the remaining nine lots totaling $24,252.70, respondent made payment, prior to filing its answer, in the total amount of $11,847.20. In its answer, respondent gave as its only justification for not paying the balance the assertion that as to two lots complaints had been filed against the buyer, and that as to the remaining seven lots, "We have negotiated the difference." The regulations relative to grower's agents provide in relevant part that:

> . . . the accounting to each of the growers shall itemize . . . all the details of the disposition of the produce received from each grower including all sales, adjustments, rejections, details

Decision and order filed April 13, 1987.

Grower's agent contract—Accounting requirements for grower's agents.

Complainant claimed a sale to respondent of numerous shipments of tomatoes. However, it was found that the evidence supported a grower's agent relationship between the parties. The record disclosed that respondent failed to properly account to complainant under the grower's agent agreement, and complainant was awarded reparation based on the amounts shown on growers pack out sheets given to complainant by respondent which were found to reflect market price at time of shipment.

George S. Whitten, Presiding Officer

Complainant, pro se.

Respondent, pro se.

Decision issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $22,755.75 in connection with the shipment in interstate commerce of numerous shipments of tomatoes.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

Although the amount claimed in the formal complaint exceeds $15,000.00, the parties have waived oral hearing, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements; however, neither party did so. Neither party filed a brief.

Findings of Fact

1. Complainant, Art Lozano, is an individual whose address is P.O. Box 961, Immokalee, Florida.

2. Respondent, Whizpac, Inc., is a corporation whose address is P.O. Box 5029, Immokalee, Florida. At the time of the transactions involved herein, respondent was licensed under the Act.

3. On or about January 17 through 21, 1985, respondent, acting as a grower's agent, agreed to sell on complainant's behalf to parties outside the state of Florida, at stated prices which were the then current market prices, various specified quantities, qualities, and sizes of tomatoes. It was agreed that specific amounts would be deducted from each lot

through its designated agent on or about the date of their arrival, July 25, 1984. Having accepted the potatoes, respondent had the burden to prove that they did not meet contract specifications. *Rydell California Potatoe Co. v. The Kaufman-Brown Potatoe Company*, 16 Agric. Dec. 1055 (1957). It did not do so. Because it did not do so, it cannot claim damages.

Complainant secured a federal inspection at shipping point when the potatoes were shipped showed they were free from defects. In order to show that goods were not in suitable shipping condition when sold the receiver must show that transportation conditions were normal. *See Six L's Packing Company, Inc. v. Sloan Produce, Inc.*, 29 Agric. Dec. 615 (1970). It failed to do so. First, 13 days for rail transport from California to Virginia exceeds a reasonable time. We found in *Richard S. Brown, Inc. v. Sol Salins, Inc.*, 43 Agric. Dec. ___ (1984) that ten days for transportation from California to Maryland was normal. That same time frame is applicable here. Second, although a temperature recorder was not put aboard the railcar, it only showed temperatures for the first nine days. They were normal, but we cannot determine whether temperatures were normal for the last four days of transit.

The federal inspection called for by respondent was held two days after it accepted the potatoes. Since we have found that the potatoes arrived three days later than they normally should have, and the inspection was two days after that, we are constrained to conclude, particularly since we do not know whether temperatures were normal during the last few days of transport, that the rot cannot be attributed to conditions prior to shipping. Five percent rot during and after shipping is not abnormal under the circumstances here.

In view of our findings we conclude that respondent has violated section 2 of the Act for which reparation should be awarded with interest. The counterclaim should be dismissed. The contract price was $28,622.50. Complainant properly mitigated damages by a prompt resale. However, the resale fetched only $15, 122.48, leaving $13,500.02 still due and owing.

Order

Respondent shall pay to complainant $13,500.02, with interest at the rate of 13 percent per annum from September 1, 1984, until paid.

The counterclaim is dismissed.

Copies of this order shall be served on the parties.

ART LOZANO v. WHIZPAC, INC.
PACA Docket No. 2-6953

provided in the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an Opening Statement and a brief. Respondent filed no other documents.

Findings of Fact

1. Complainant, Johnston-Gibson Sales Company, is a partnership located in Edison, California. At the time of the transaction in issue in this proceeding the complainant was licensed under the Act.

2. Respondent, The Southland Corporation, is a corporation located in Dallas, Texas, with a branch office in Falmouth, Virginia. At the time of the transaction involved in this proceeding respondent was licensed under the Act.

3. On July 12, 1984, complainant sold to respondent in interstate commerce 2,200 cartons of U.S. No. 1 potatoes at $13.00 per carton, plus a temperature recorder, for a total invoice price of $28,622.50, FOB.

4. The potatoes were shipped by railcar from California on July 12, 1984, to Falmouth, Virginia, where they arrived on July 25, 1984. The cartons were unloaded by respondent on that date, and placed in its warehouse, as a result of which they were received and accepted.

5. On July 27, 1984 respondent secured a federal inspection of the potatoes which showed in pertinent part that their condition was "Generally firm. In most samples done, many 6 to 20%, average 5% Slimy Soft Rot and Charcoal Rot in various stages." This compared with a federal inspection at shipping point on July 12, 1984, which showed that there were no decay or rot.

6. After an exchange of telephone conversations and telegrams between complainant and respondent in which the parties disagreed as to whether complainant or respondent was responsible for the load, in order to mitigate damages complainant took dominion over the goods, and had them resold through a broker for a net price of $15,122.48, after expenses.

7. A formal complaint was filed in this proceeding on March 1, 1985, which was within nine months of the date cause of action accrued. The counterclaim was also filed in a timely manner.

Discussion

Based upon our analysis of the facts and the law applicable to this proceeding we conclude that complainant must prevail. It is a basic tenet of law under the Perishable Agricultural Commodities Act that when a receiver has unloaded goods from their conveyance it has accepted them. *Theron Hooker Company v. Ben Gatz Co.*, 30 Agric. Dec. 1109, 1112 (1971). Respondent has admitted that it did so

testimony, bolstered by the testimony of the broker, a relatively neutral party, was never rebutted by the sworn testimony of complainant. Weighing this evidence against the presumption, and against complainant's unsworn letter, we have concluded that complainant did authorize sale with protection against loss, with no requirement of a Federal inspection. See McCormick, Handbook of the Law of Evidence, § 311 (1954). The complaint should be dismissed.

Order

The complaint is dismissed. Copies of this order shall be served upon the parties.

JOHNSTON-GIBSON SALES, CO. v. THE SOUTHLAND CORPORATION.

PACA Docket No. 2-6895.

Decision and order filed April 24, 1987.

Acceptance by unloading—Effect of delay in transportation—Burden of proof of damages—Mitogation of damages.

Where respondent unloaded potatoes at its place of business, it accpeted them, and could only claim damages based on fact they did not meet contract specifications. Since contract was f.o.b. percentage of defects was only 5% at destination; there was a delay in transit and further delay in inspection, respondent could not prove damages, and was liable for full contract price.

Dennis Becker, Presiding Officer.

Thomas R. Oliveri, Newport Beach, California, for complainant.

Richard R. Hayslett, Dallas Texas, for respondent.

Decision issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $13,500.02 in connection with the shipment of a railcar of potatoes in interstate commerce.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed a timely answer in which it denied the allegations of the complaint, and a counterclaim. Complainant filed a timely answer to the counterclaim in which it denied liability to the respondent.

Since the amount claimed in both the complaint and the counterclaim does not exceed $15,000 the shortened method of procedure

authorized anyone to handle the berries without requesting that an inspection be made. Complainant also asserted that he did not know of any problem in the berries until after January 1, 1985.

Since respondent and the broker agree as to what occurred following the arrival of the berries, and in view of the relatively neutral position of the broker as between the two parties herein, we find that respondent has proved by a preponderance of the evidence that it was authorized to resell the strawberries with protection against loss, without securing a federal inspection.

The question now arises as to whether the Department's regulations concerning proof of dumping of perishable produce were complied with in this case. Such regulations (7 C.F.R § 46.22) require that ". . . if five percent or more of a shipment is dumped, an official certificate, or other adequate evidence, shall be obtained to prove the produce was actually without commercial value, unless there is a specific agreement to the contrary between the parties." We would be disposed to hold that respondent's dumping of such a substantial portion of the load of berries would contravene these regulations, in spite of the agreement allowing protection, had not the agreement also provided for no federal inspection being necessary. The provisions in the regulations concerning dumping protect a shipper from unjustified claims that produce received had no commercial value, by requiring independent proof of such lack of of value. Had there been merely an agreement for protection standing alone, there would be no reason to find that the shipper had waived his right to the proof required by the regulations. However, since Federal inspections are the most common means of proving lack of commercial value for purposes of dumping, the provision in the parties' agreement that respondent could resell with protection against loss, without securing a Federal inspection, amounted to just such a specific agreement as is contemplated by the regulations under which proof of lack of commercial value is waived.

It should be noted that the requirement in the regulations of independent proof of lack of commercial value prior to dumping is a unique appendage to the ordinary law of sales, and is based upon the perishable nature of produce, coupled with the fact that although dumping is often necessary, it destroys all concrete evidence of the condition of the produce. The law concerning the sale of hardware is not afflicted with these difficulties. One can imagine how a civil court would treat a claim for damages on the part of the purchaser of an allegedly defective automobile who stated that he had destroyed the automobile because it was worthless and now wanted to be credited with its full purchase cost. For these reasons we do not intend to lightly grant credence to claims that a party has verbally waived his right to proof of dumping. Indeed, we propose to adhere to a presumption that a party has not waived so important a right. In this case, however, respondent's repeated sworn

31, 1984. The question consequently arises whether such inspection might be deemed to prove that the potatoes were unmerchantable when shipped. A warranty of merchantability exists even though no suitable shipping condition warranty applies. However, the merchantability warranty is applicable only at shipping point. See *David Pepper Co. v. Jack Keller Co.*, 28 Agric. Dec. 474 (1969).

We have defined the term merchantable as:

> "goods which are reasonably suited for the ordinary uses and purposes of goods or the general type described by the terms of the sale and which are capable of passing in the market under the name of description by which they are sold," and though not descriptive of goods of the poorest quality, neither does it imply goods of the poorest quality, but covers goods of fair, average quality. *L. Gillarde Sons Co. v. Mority*, 21 Agric. Dec. 590 at 595 (1962).

See also U.C.C. § 2-314. We have previously explained the relationship between the suitable shipping condition warranty and the warranty of merchantability as follows:

> The suitable shipping condition warranty is an extension of the warranty of merchantability beyond the scope contemplated by early cases, so that a perishable commodity is required to be shipped in such a condition that it will not be abnormally deteriorated at contract destination provided transportation services and conditions are normal. . . In order for us to find on the basis of a destination inspection that there was a breach of the warranty of merchantability such inspection would have to disclose condition defects so severe as to make it reasonably certain that the commodity was not merchantable at the time of shipment. *North American v. Eddie Arakelian*, 41 Agric. Dec. 759 (1982).

In this case the fact that only two days elapsed between point of sale and inspection, together with the high incidence of Slimy Soft Rot in *advanced* stages, and the fact that the potatoes were in consumer bags which would make reworking extremely expensive, leads us to the conclusion that the potatoes were not merchantable when shipped.

The measure of damages for breach of warranty in regard to accepted goods is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted. In addition, reasonable expenses incident to the breach are allowable. See *G. & S. Produce Co. v. Walton Distributors*, 35 Agric. Dec. 1653 (1976), and U.C.C. §§ 2-714 & 2-715. The value of the goods received is shown by the results of a prompt and proper resale of the goods. *Half Moon Fruit & Produce Company v. V. F. Lanasa*, 39 Agric. Dec. 1520 (1980). In this case gross proceeds of the resale amounted to $342. We accept this figure as the value of the good received. The value of the potatoes if they had been as warranted is best shown by sales of similar product on the same market. This may be proved by appropriate Market News

Service Reports. In this case no such reports were submitted and we will therefore use the contract price plus freight to destination as the value of the goods if they had been as warranted. See Id. at 1525 and *G. & S. Produce Co.* at 1658. The contract price of the potatoes was $1,868.46 and we consider a conservative estimate of freight charges to be $1.75 per cwt. or $731.50. The value of the potatoes if they had been as warranted was therefore $2,599.96. Subtracting the value of the potatoes received, or $324 from this figure yields $2,275.96 as respondent's basic damages. In addition, as previously stated, respondent should be allowed expenses incidental to complainant's breach. Mayfield claimed such fees in the total amount of $243.40. We agree that these expenses were incidental to complainant's breach and should be allowed. Respondent's total damages therefore amount to $2,519.36. As stated earlier respondent by its acceptance, became liable to complainant for the purchase price of the second load, or $1,868.46. Respondent has already paid complainant $537.13 of this amount, leaving a balance of $1,331.33. This amount deducted from respondent's damages on the second load leaves a balance to respondent's credit of $1,188.03. This amount should be set off against the $1,837.17 which we found to be due from respondent to complainant on the first load. The net amount due to complainant from respondent on the two loads is $649.14. Respondent's failure to pay complainant this amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

Order

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $649.14, with interest thereon at the rate of 13% per annum from July 1, 1984, until paid.

Copies of this order shall be served upon the parties.

ROBERT A. SHIPLEY, d/b/a SHIPLEY SALES SERVICE v. PEACOCK SALES CO., INC.

PACA Docket No. 2-7004

Decision and order filed April 29, 1987.

Transit conditions, freezing damage—F.O.B. warranty of suitable shipping condition, breach—Rescission of contract, not shown by shipper's agreement to repossess goods accepted by buyer—Damages, buyer's shown by difference between contract price and net proceeds of shipper's resale.

A Federal inspection of grapes the day following arrival was held to show no freezing damage in spite of low temperatures on Ryan tape. Transit was found to be normal

and the shipper to have breached the warranty of suitable shipping condition. Following buyer's acceptance the shipper was informed by the buyer that the contract was invalid and was offered a new contract at a substantially lower price. The shipper informed the buyer he would rather take the grapes back and attempt to sell them himself and proceeded to do so It was held that this did not constitute a rescission of the original contract. The shipper's resale was held to reflect the true value of the grapes delivered to the buyer and therefore the buyer's damages were found to equal the difference between the net proceeds of such resale and the original contract price. The complaint was dismissed

George S. Whitten, Presiding officer.

Complainant, pro se.

Hactor G. Arana, Nogales, Arizona, for respondent.

Decision issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Prelimlnary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $5,710.25 in connection with the shipment in interstate commerce of a truckload of grapes.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements Complainant did not file an opening statement. Respondent filed an answering statement and complainant filed a statement in reply. Respondent filed a brief.

Findings of Fact

1. Complainant, Robert A. Shipley, is an individual doing business as Shipley Sales Service, whose address is P. O. Box 894, Nogales, Arizona

2. Respondent, Peacock Sales Co., Inc., is a corporation whose address is P. O. Box 2299, Nogales, Arizona. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On or about July 5, 1985, complainant sold to respondent and shipped from loading point in the State of Arizona to respondent's customer in Detroit, Michigan, one truckload containing 1746 lugs of Thompson seedless grapes at $14.55 per lug f.o.b.

4. A Ryan temperature recorder was included on the truck and the tape from such recorder shows that during the first 12 hours of transit the temperature fluctuated between approximately 33 degrees and 47 degrees. During the next 12 hours, the temperature fluctuated between 30 and 33 degrees. At approximately the 24th hour, the temperature rose briefly to about 42 degrees and dropped sharply to about 29 degrees at approximately the 30th hour. The trace then continued steady until about the 40th hour where it again rose briefly to 40 degrees at the 42nd hour and fell again to the 30 degree range at approximately the 48th hour where it continued steady until approximately the 96th hour. According to the Department's publication, *Market Diseases of Grapes and Other Small Fruits*, Agriculture Handbook No. 189, the average freezing point for Thompson seedless grapes is 27.2 degrees F. The freezing point for the stems of the grapes is somewhat higher than this.

5. The truckload of grapes arrived at the place of business of respondent's customer, in Detroit, Michigan, on July 9, 1984, at about 5:00 p.m. The following morning, July 10, 1984, at 6:45 a.m., the grapes were federally inspected after having been unloaded into the warehouse of respondent's customer. Such inspection showed, in relevant part, as follows:

> Temperature of Product: In various lugs: 40 to 41-F.
>
> Condition: Berries generally firm and firmly attached to cap stems. Stems light green and pliable. Damage by brown discoloration in most lugs from less than ½ of 1 to 5%, many 9 to 16%, average 6% generally occurring in bottoms of lugs. Serious damage by weak, watery, discolored berries in most samples from 5 to 14%, many from less than 1 to 2%, average 7%. Shatter berries from 2 to 6%, average 4%. No decay.

6. Following the federal inspection, the respondent informed complainant by telephone that the grapes did not meet contract requirements and that the "contract was, therefore, invalid." During the same conversation, respondent also informed complainant that "a new contract price commensurate with the condition of the grapes could be contracted for at approximately $8.50 per lug." Complainant then informed respondent that he would rather take the produce back and attempt to resell it himself.

7. Complainant proceeded to take back the grapes and have them resold by Teddy Bertuca Company in Benton Harbor, Michigan, for net proceeds which totaled $19,280.05.

8. The informal complaint was filed on April 4, 1985, which was within nine months after the cause of action alleged herein accrued.

Conclusions

Complainant brings this action to recover the difference between the net proceeds realized by complainant from the resale of the grapes and the original contract price for which the grapes were sold to respondent. Complainant maintains that the Ryan temperature recorder tape shows freezing temperatures during transit and that a substantial portion of the damage shown by the federal inspection at destination must be attributed to the temperatures shown by the Ryan temperature tape. We do not agree. First, the type of damage shown by the federal inspection at destination is not indicative of freezing. The brown discoloration disclosed by the inspection report should probably be identified with internal browning which, according to Agriculture Handbook No. 189, is apparently a symptom of physiologic aging in Thompson seedless grapes. The serious damage by weak and watery berries is most likely identified with "water berry" (See Agriculture Handbook No. 189, page 22) and is also not associated with freezing. According to the market inspection instructions for grapes (*Grapes*, Market Inspection Instructions, November, 1971, United States Department of Agriculture, Agricultural Marketing Service, page 36), shattered berries are berries that have separated from the bunch due either to the breaking of the cap stem or the removal of the cap stem from the berry. The instructions state that "this is a common defect of some varieties, particularly the Thompson seedless." There is nothing to indicate that these shattered berries had anything to do with freezing damage. According to the market inspection instructions, freezing injury is a specific type of injury which is to be noted on an inspection report as such. (*See*, *Id.* page 39). In addition, Agriculture Handbook No. 189 states that the freezing point for Thompson seedless grapes is 27.2 degrees F., or substantially lower than any temperature noted on the Ryan temperature tape. We conclude that transportation services and conditions were normal as to this load of grapes, and that the damage shown by the destination inspection was not related to freezing.

The amount of damage shown by the destination inspection exceeds that which can be allowed for good delivery. We conclude, therefore, that complainant breached the contract of sale.

Respondent maintains that complainant's agreement to take back the grapes amounted to a modification or rescission of the original contract and that as a consequence respondent has no liability to complainant. However, it is clear to us that respondent has shown no more than a simple agreement on complainant's part to take back grapes which had previously been accepted by respondent. We see no reason on the basis of this record to conclude that there was an agreement to rescind the contract so as the release respondent from any potential liability. However, in view of complainant's decision to take back the grapes which had previously been accepted by respondent and take responsibility for their resale, we are forced to conclude that such resale repre

sents the true market value of the grapes which respondent accepted. Respondent's damages for complainant's breach of contract would therefore equal the difference between the net proceeds of such resale and the original contract price between the parties. *See, Halfmoon Fruit & Produce Company v. V. F. Lanasa, Inc.*, 39 Agric. Dec. 1520 (1980). The complaint should be dismissed.

Order

The complaint is dismissed.

Copies of this order shall be served on the parties.

A. G. SHORE COMPANY, INC. v. FRANK L. KELSOE, GLENN D. PERRY, and STEVEN TAVILLA d/b/a GULF LAKE PRODUCE COMPANY.

PACA Docket No. 2-6993

Decision and order filed April 10, 1987.

Broker, liability for purchaser's failure to pay—Broker, entitlement to receive commission.

Complainant broker was found to be due majority of claimed brokerage fees from respondent seller.

George S. Whitten, Presiding officer.

Complainant, pro se.

Respondent, pro se

Decision issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a et seq.). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $2,162. 50 in connection with the shipment in interstate commerce of numerous lots of mixed perishable produce.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which defaulted in the filing of an answer. On August 15, 1985, a default order was issued in complainant's favor. Subsequently respondent petitioned to reopen after default. On September 24, 1985, the default order was stayed and complainant was given opportunity to file an answer to respondent's petition, and on [illegible] was reopened and an answer previously

filed by respondent, denying generally liability to complainant, was ordered filed.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules Practice (7 C.F.R. § 47.20) is applicable Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements, however, neither party did so. Neither party filed a brief.

Findings of Fact

1. Complainant, A. G. Shore Company Inc., is a corporation whose address is 4539 Clover Drive, Clemmons, North Carolina.

2. Respondent is a partnership composed of Frank L. Kelsoe, Glenn D. Perry, and Steven Tavilla doing business as Gulf Lake Produce Company, whose address is P.O. Box 697, Belle Glade, Florida. At the time of the transactions involved herein respondent was licensed under the Act.

3. During the months of January through May, 1984, complainant acted as broker in regard to the sale of numerous truckloads of mixed produce shipped from respondent in Florida to various customers in Georgia, North Carolina, South Carolina, and Tennessee. Brokerage charges on all of these sales totaled $3,061.10.

4. Respondent has made payment to complainant in the total amount $1,362.10.

5. The informal complaint was filed on October 4, 1984, which was within nine months after the causes of action herein accrued.

Conclusions

Complainant claims to have billed respondent for brokerage fees in the total amount of $3,086.60. However, respondent contends that the last bill claimed by complainant in the amount of $25.50 for brokerage fees allegedly incurred during the month of June, 1984, was never received by respondent, and that furthermore no shipments were made in June, 1984. Based on the evidence available, we conclude that complainant has failed to prove that the amount of $25.50 is due from respondent for brokerage fees incurred in June of 1984. Apart from this $25.50 figure respondent does not take issue with complainant's claim that brokerage fee amounts totaled $3,086.60 for shipments of produce during the months of January through June of 1984. However, respondent does claim various justifications for not paying complainant in full for the brokerage claimed.

The reason most frequently given by respondent for refusing to pay brokerage items claimed by complainant is that the truck on which the produce was shipped was secured by complainant, and shortages or unloading fees charged back to respondent by its customers, or deduc

tions for failure to deliver in time, should be complainant's responsibility. This argument is clearly erroneous. Relative to these transactions complainant acted only as a broker, and respondent has not shown why complainant's securing of the truck should in any way make complainant liable for errors of the trucker in a f.o.b. sale. See *Victor D. Bendal Company v. A. Peltz & Sons, Inc.* 39 Agric. Dec. 311 (1980) and *Clement Jones Co., Inc., v. Cherry Foods, Inc.*, 34 Agric. Dec. 677 (1975).

As to a $26.55 deduction which respondent made from complainant's brokerage bill, respondent states that its customer deducted such amount for an unknown reason when paying respondent. Respondent then states that "a rebilling for balance due indicates that complainant should pay". We cannot see that respondent has given any reason why complainant should pay this amount. As to an $89.00 deduction which respondent made from complainant's brokerage statement of January, 1984, respondent states that complainant's customer J. S. Weeks & Company turned down 10 escarole at $8.90 on arrival, and that consequently respondent is justified in deducting the $89.00 from complainant's brokerage. However, the documentation submitted by the parties shows that respondent billed J. S. Weeks & Company, not complainant. Accordingly, we conclude that Weeks was obviously respondent's customer, and respondent is not justified in deducting this amount from brokerage due to complainant. Respondent gave as, a justification for deducting $15.90, and $9.30, from brokerage due to complainant, the explanation that there were discrepancies in the amount of brokerage due. Respondent did not explain the "discrepancies" nor satisfactorily prove that such discrepancies existed. These deductions also cannot be allowed.

There are two remaining deductions for which respondent has furnished adequate justification. First, as to a $13.40 deduction respondent has furnished documentary evidence that complainant deducted such amount in paying respondent for produce sold by respondent to complainant on March 29, 1984. Complainant did not rebut respondent's allegation in regard to this deduction. The second deduction is for $590.00 in connection with produce which respondent's documentation shows was sold by respondent to complainant on March 30, 1984, and in turn was sold by complainant to East Tennessee Produce. Complainant's own documentation attached to the formal complaint shows that this produce was indeed sold by respondent to complainant, and in turn by complaint to East Tennessee Produce. Such documentation also shows that East Tennessee Produce subtracted $590.00 when it paid complainant, and that complainant in turn subtracted the same amount when it paid respondent. Complainant did not explain why it should have been allowed to deduct such amount when it paid

respondent, and we therefore conclude that such deduction was rightfully made by respondent.

The total brokerage billed from January through May of 1984 by complaint to respondent was $3,061.10. Respondent has already paid complainant $1,362.10 of this amount. In addition respondent has shown adequate justification for deducting $603.40 from payments due to complainant. A balance of $1,095.60 remains due from respondent to complainant. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complaint with interest.

Order

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $1,095.60, with interest thereon at the rate of 13 percent per annum from May 1, 1984, until paid.

Copies of this order shall be served upon the parties.

ARNOLD SOUSA & FRANCIS S(
SAN JOAQUIN TOMATO GROWI

PACA Docket No. 2-6780

Decision and order filed April 13,

Negligent for grower's agent to gran dependent evidence is produced tc price is accurate and reliable price contained within evidence—Par'ies agreement terms.

Respondent was grower's agent for onion allowance on some of the loads of compla tion inspection which would indicate a re arrived at destination with significant cond Complainant awarded reparation for amo for which it had no inspection certificate.

Allan R. Kahan, Presiding officer.

James E. Ganzer, Stockton, California, f

J.T. Reshwain, Jr., Stockton, California,

Decision issued by Donald A. Camp

DECISION A

This is a reparation proceeding Commodities Act, as amended (7 U 2, 1984, complainant filed a forma seeks an award of reparation agai $43,271.55, in connection with the terstate commerce.

A copy of the report of investigation prepared by the Department was served on each of the parties. Respondent filed an answer to the complaint denying any liability thereunder.

Respondent requested an oral hearing and such hearing was held on December 4, 1985, in Sacramento, California. Two witnesses testified for complainant, and four witnesses testified on behalf of respondent. Complainant introduced thirteen (13) exhibits. Respondent introduced six (6) exhibits.

Findings of Fact

1. Complainant is a partnership composed of Arnold Sousa and Frances Sousa doing business as Sousa Farms, whose address is 17750 East Highway 4, Stockton, California 95205.

2 Respondent San Joaquin Tomato Growers, Inc., is a corporation whose address is P. O. Box 8187, Stockton, California 95208. At the times of the transactions involved herein, respondent was licensed under and subject to the provisions of the Act as a dealer, commission merchant and broker.

3. On or about June 21 through July 18, 1983, in the course of interstate commerce, complainant and LCL Farms, Inc., consigned various lots of onions, a perishable agricultural commodity, to respondent to be sold for complainant (and LCL Farms, Inc.). LCL Farms, Inc., is a corporation owned by Sam Loduca and his brother, Bill Loduca, and Jim Chavez.

4. The contract between complainant and respondent was an oral, not written, contract.

5. On or about June 21, 1983, complainant consigned to respondent for sale in interstate commerce, on invoice no. 210, 850 50 pound sacks of jumbo yellow onions. Respondent sold the onions to Community-Suffolk, Inc., Everett, Massachusetts, for $3.50 per sack f.o.b., and deducted $212.50 selling commission, $127.50 for brokerage and commission, and a deduction for inspection of $38.25.

6. On or about June 21, 1983, complainant consigned to respondent for sale in interstate commerce, on invoice no. 211, 550 50 pound

f.o.b., and deducted $187.50 selling commission, $142.35 for brokerage and commission, and a deduction for inspection of $33.75.

8. On or about June 24, 1983, complainant consigned to respondent for sale in interstate commerce, on invoice no. 213, 150 50 pound sacks of jumbo yellow onions. Respondent sold the onions to Pacific Fruit, Atwater, California, for $3.35 per sack f.o.b. net, and deducted $37.50 selling commission and a deduction for inspection of $6.75.

9. On or about June 21, 1983, complainant consigned to respondent for sale in interstate commerce, on invoice no. 214, 375 50 pound sacks of jumbo yellow onions and 100 50 pound sacks of medium yellow onions. Respondent sold the onions to CDS Distributing, Inc., Oakland, California, for $3.50 per sack for the jumbo onions and $3.00 per sack for the medium onions f.o.b., and deducted $118.75 selling commission, $47.50 for brokerage and commission and a deduction for inspection of $21.38.

10. On or about June 25, 1983, complainant consigned to respondent for sale in interstate commerce, on invoice no. 215, 550 50 pound sacks of jumbo yellow onions and 300 50 pound sacks of medium yellow onions. Respondent sold the onions to Pacific Fruit and Produce, Atwater, California, for $3.35 per sack for the jumbo onions and $2.85 per sack for the medium onions f.o.b., and deducted $212.50 selling commission and a deduction for inspection of $38.25.

11. On or about June 28, 1983, complainant consigned to respondent for sale in interstate commerce, on invoice no. 216, 150 50 pound sacks of jumbo yellow onions. Respondent sold the onions to CDS Distributing, Inc., Oakland, California, for $3.75 per sack f.o.b., and deducted $37.50 selling commission, $22.50 for brokerage and commission and a deduction for inspection of $6.75. Respondent made an unauthorized deduction of $.25 per sack, equaling $37.50, on the sale.

12. On or about June 28, 1983, complainant consigned to respondent for sale in interstate commerce, on invoice no. 217, 950 50 pound sacks of jumbo yellow onions. Respondent sold the onions to Community-Suffolk, Inc., Everett, Massachusetts, for $3.50 per sack f.o.b., and deducted $237.50 selling commission, $142.50 for brokerage and commission and a deduction of $42.75 for inspection. Respondent made an unauthorized deduction of $.50 per sack, equaling $475.00, on the sale.

13. On or about June 28, 1983, complainant consigned to respondent for sale in interstate commerce, on invoice no. 218, 950 50 pound sacks of jumbo yellow onions. Respondent sold the onions to Community-Suffolk, Inc., Everett, Massachusetts, for $3.50 per sack f.o.b., and deducted $237.50 selling commission, $142.50 for brokerage and commission and a deduction for inspection of $42.75. Respondent made an unauthorized deduction of $.50 per sack, equaling $475.00, on the sale.

14. On or about June 28, 1983, complainant consigned to respondent for sale in interstate commerce, on invoice no. 219, 950 50 pound sacks of jumbo yellow onions. Respondent sold the onions to Community-Suffolk, Inc., Everett, Massachusetts, for $3.50 per sack f.o.b., and deducted $237.50 selling commission, $142.50 for brokerage and commission and a deduction of $42.75 for inspection. Respondent made an unauthorized deduction of $.50 per sack, equaling $475.00, on the sale.

15. On or about June 30, 1983, complainant consigned to respondent for sale in interstate commerce, on invoice no. 220, 60 50 pound sacks of jumbo yellow onions and 10 50 pound sacks of medium yellow onions. Respondent sold the onions to Pacific Fruit and Produce, Atwater, California, for $3.35 per sack for the jumbo onions and $2.85 per sack for the medium onions f.o.b., and deducted $17.50 selling commission and a deduction for inspection of $3.15.

16. On or about June 29, 1983, complainant consigned to respondent for sale in interstate commerce, on invoice no. 221, 900 50 pound sacks of jumbo yellow onions. Respondent sold the onions to Garden State Farms, Philadelphia, Pennsylvania, for $3.50 per sack f.o.b., and deducted $225 00 selling commission, $135.00 for brokerage and commission and a deduction for inspection of $40.15.

17. On or about June 29, 1983, complainant consigned to respondent for sale in interstate commerce, on invoice no. 222, 450 50 pound sacks of jumbo yellow onions and 160 50 pound sacks of prepack yellow onions. Respondent sold the onions to Casey Woodwyk, Inc., Hudsonville, Michigan, for $4.00 per sack for the jumbo onions and $3.00 per sack for the prepack onions f.o.b., and deducted $152.50 selling commission, $135.00 for brokerage and commission and a deduction for inspection of $40.50.

18. On or about June 30, 1983, complainant consigned to respondent for sale in interstate commerce, on invoice no. 223, 2000 50 pound sacks of jumbo yellow onions. Respondent sold the onions to [illegible]ato Co., Inc., Bronx, New York, for $3.50 per sack f.o.b., and deducted $500.00 selling commission and a deduction for inspection of $90.00.

19. On or about July 1, 1983, complainant consigned to respondent for sale in interstate commerce, on invoice no. 224, 75 50 pound sacks of medium yellow onions. Respondent sold the onions to Pacific Fruit and Produce, Atwater, California, for $2.85 per sack f.o.b., and deducted $18.75 selling commission and a deduction for inspection of $3.38.

20. On or about July 5, 1983, complainant consigned to respondent for sale in interstate commerce, on invoice no. 237, 25 50 pound sacks of jumbo yellow onions and 100 50 pound sacks of medium yellow

onions. Respondent sold the onions to CDS Distributing, Inc., Oakland, California, for $4.00 per sack for the jumbo onions and $3.25 per sack for the medium onions f.o.b., and deducted $31.25 selling commission, $12.50 for brokerage and commission and a deduction for inspection of $5.63.

21. On or about July 6, 1983, complainant consigned to respondent for sale in interstate commerce, on invoice no. 239, 400 50 pound sacks of jumbo yellow onions. Respondent sold the onions to Casey Woodwyk, Hudsonville, Michigan, for $4.00 per sack f.o.b., and deducted $100.00 selling commission, $60.00 for brokerage and commission and a deduction for inspection of $18.00.

22. On or about July 8, 1983, complainant consigned to respondent for sale in interstate commerce, on invoice no. 246, 1450 50 pound sacks of jumbo yellow onions and 550 50 pound sacks of medium yellow onions. Respondent sold the onions to Community-Suffolk, Everett, Massachusetts, for $4.50 per sack for the jumbo onions and $3.25 per sack for the medium onions f.o.b., and deducted $500.00 selling commission, $345.00 for brokerage and commission and a deduction for inspection of $92.00.

23. On or about July 8, 1983, complainant consigned to respondent for sale in interstate commerce, on invoice no. 249, 400 50 pound sacks of jumbo yellow onions. Respondent sold the onions to State Produce Co., Newark, New Jersey, for $6.00 per sack f.o.b., and deducted $100.00 selling commission, $60.00 for brokerage and commission and a deduction for inspection of $18.00.

24. On or about July 9, 1983, complainant consigned to respondent for sale in interstate commerce, on invoice no. 253, 1000 50 pound sacks of jumbo yellow onions. Respondent sold the onions to Havana Potatoes Corp., Edgewater, New Jersey. Upon arrival, the onions were inspected and found to have significant condition problems, including 4-9% sunscald, average 7%; damage by Black Mold averaging 5%; decay from 10-25%, average 17% and other soft rot and mold rot at various stages. Respondent sold the onions for nothing, with the purchaser paying the transportation.

25. On or about July 9, 1983, complainant consigned to respondent for sale in interstate commerce, on invoice no. 254, 400 50 pound sacks of jumbo yellow onions. Respondent sold the onions to Pacific Fruit, Atwater, California, for $4.35 per sack f.o.b., and deducted $100.00 selling commission and a deduction for inspection of $18.00.

26. On or about July 13, 1983, complainant consigned to respondent for sale in interstate commerce, on invoice no. 268, 400 50 pound sacks of jumbo yellow onions. Respondent sold the onions to State Produce Co., Newark, New Jersey, for $6.00 per sack f.o.b., and deducted $100.00 selling commission, $60.00 for brokerage and commission and a deduction for inspection of $18.00.

27. On or about July 12, 1983, complainant consigned to respondent for sale in interstate commerce, on invoice no. 270, 825 50 pound sacks of jumbo yellow onions. Respondent sold the onions to A. Levy Distributing Co., Inc., Fresno, California, for $5.50 per sack f.o.b., and deducted $206.25 selling commission and a deduction for inspection of $37.13. Respondent made an unauthorized price reduction of $.65 per sack, equaling $536.25, on the sale.

28. On or about July 13, 1983, complainant consigned to respondent for sale in interstate commerce, on invoice no. 272, 1000 50 pound sacks of jumbo yellow onions. Respondent sold the onions to Community Suffolk, Everett, Massachusetts. Upon arrival, the onions were inspected and found to have significant condition problems, including an average 2% damage by sunscald; decay ranges of 2–10%, average 5% Bacterial Soft Rot mostly advanced, some in early stages affecting 1 to 3 outer scales. Respondent sold the onions for $.90 per sack f.o.b., and deducted $250.00 selling commission, $150.00 for brokerage, and $46.00 for inspection.

29. On or about July 14, 1983, complainant consigned to respondent for sale in interstate commerce, on invoice no. 275, 750 50 pound sacks of jumbo yellow onions and 250 50 pound sacks of prepack yellow onions. Respondent sold the onions to Joseph Fierman & Sons, Bronx, New York. Upon arrival, the onions were inspected and found to have significant condition problems, including decay ranges from 40–56%, average 50% on the jumbo onions and 14–26% on the prepack Respondent sold the onions for nothing, with the seller paying the freight.

30. On or about July 15, 1983, complainant consigned to respondent for sale in interstate commerce, on invoice no. 279, 500 50 pound sacks of jumbo yellow onions. Respondent sold the onions to Pacific Fruit and Produce, Atwater, California, for $6.00 per sack f.o.b., and deducted $93.75 selling commission, $75.00 for brokerage and commission and a deduction for inspection of $17.25.

31. On or about July 16, 1983, complainant consigned to respondent for sale in interstate commerce, on invoice no. 285, 2000 50 pound sacks of jumbo yellow onions. Respondent sold the onions to Havana Potatoes Corp., Edgewater, New Jersey. Upon arrival, the onions were inspected and found to have substantial condition problems, including 4–15% sunscald, average 9%; decay in most sacks from 23–40%, in many 16–18%, average 25%; and Black Mold and Bacterial Soft rot present. Respondent sold the onions for $.50 f.o.b. per sack, and deducted $92.00 for inspection.

32. On or about July 18, 1983, complainant consigned to respondent for sale in interstate commerce, on invoice no. 288, 1291 50 pound sacks of jumbo yellow onions, 235 50 pound sacks of medium yellow

onions, and 150 sacks of prepack yellow onions. Respondent sold the onions to Barry Mandel Produce, Cincinnati, Ohio. Upon arrival, the onions were inspected and found to have significant condition problems, including from 31–86% decay, average 53%. Respondent sold the onions for nothing, f.o.b.

33. A formal complaint was filed on January 2, 1984, which was within nine months of the time the causes of action arose.

Conclusions

Complainant seeks to recover the difference between the Market News price [1] for yellow onions and the price respondent paid complainant for the 29 lots of onions, less the legitimate commission, inspection and brokerage fees involved. Respondent interposes as its defense that not all the onions were sold for the Market News price, and that as a result of the deteriorated condition of some of the onions on arrival, they were disposed of for significantly less than the published fair market price. Respondent argues that it remitted the proceeds due complainant, and has filed claims with respect to some of the loads which contained onions whose condition had deteriorated. Respondent stated that if it collected on those loads, the appropriate amounts due would be forwarded to complainant.

The Agreement Between the Parties

No written contract was entered into by respondent and complainant with respect to the 1983 onion crop, although the parties had entered into written contracts relating to other crops in previous seasons. Respondent claimed that any written contract it used for onions would have contained the same provisions as the written contracts the parties had previously entered into. When the parties' relationship is examined, their course of dealing on the onion crop at issue generally mirrors the terms of the written contract they had entered into with respect to other produce. We find the parties' oral contract contained the same terms, as well as requiring the same obligations and duties, as if the parties entered into the written contract which respondent used.

However, two provisions of the written contract, read together, might appear to hold respondent harmless irrespective of any decision it might make with respect to the grower's crop. In Exhibit A to the written contract, the last sentence in paragraph (c) provides: "Shipper shall not be liable for errors in judgement in exercising any of its duties or obligations under or carrying out the terms of this agreement." The first sentence of paragraph (d) provides that: "Shipper is authorized to make whatever adjustment or to grant any allowances that in shipper's

[1] The Market News is an official publication of the Department of Agriculture which reflects the daily selling price of various agricultural commodities for different geographic areas, obtained through a sampling of the entities selling those commodities in the various geographic areas.

opinion are justifiable or necessary in order that sales be consummated at destination and cars or truck lots be accepted by buyers."

While such language would ostensibly relieve the shipper of any and all liability for any mistakes in judgment leading to adjustments in price or allowances, it would not relieve the agent for negligent actions it might have made. Generally, an agent is liable to his principal for any unauthorized allowance the agent may grant to a buyer. *McRae v. R. Patt Brokerage*, 20 Agric. Dec. 1176 (1961), or when the agent negligently fails to exercise ordinary and reasonable care and diligence in the performance of his duties. *Cooney & Korshak, Inc. v. M. Trombetta & Sons, Inc.*, 19 Agric. Dec. 890 (1960); *Adams v. Joe Phillips, Inc.*, 31 Agric. Dec. 1200 (1972).

The Accounting for the Onions

With respect to the onions involved on invoice no. 210, complainant claimed a loss of $212.50. The amount was computed on the basis of the $.25 per sack difference in price between the Market News price and the price the onions were apparently sold for. Although the Market News constitutes a credible, accurate and reliable indicator of price where evidence regarding the sale price or value of product is not contained within the evidence of a transaction, it is not the price that all sales of the described product are guaranteed to bring.

From a reading of the terms of the contract, which constituted the course of dealing of the parties, complainant permitted respondent to sell the onions at the best price obtainable. There was no credible evidence that respondent guaranteed the Market News price, or that respondent sold the onions for such price. Complainant's use of the Market News price for this purpose is invalid. Complainant's claim regarding lot no. 210 is denied.

Complainant claims various losses of between $75.00 to $587.50 for each of the loads involved in invoice nos. 211, 213, 214, 215, 220, 224, 239, 246, 254 and 279. The amounts were computed in each case by comparing the per sack price for onions of the size sold as reported in the Market News with the price respondent sold those onions for. For the same reasons set forth in the conclusions regarding invoice no. 210, complainant's claims with respect to invoices 211, 213, 214, 215, 220, 224, 239, 246, 254 and 279 are denied.

Complainant claims a loss of $37.50 for invoice no. 216, equaling the $.25 per sack adjustment respondent gave to the purchasers. Invoice no. 216 clearly shows that the shipment of 150 50 pound sacks of jumbo onions originally sold for $3.75 per sack, and that respondent granted a $.25 price adjustment. Respondent presented no credible evidence, such as an inspection certificate, that such adjustment in price was warranted, justified, or necessary to consummate the sale.

This being the case, respondent's action was negligent and violated the terms of the contract. Complainant's claim for $37.50 is granted.

Complainant claims a loss of $475.00 for each of the invoice nos. 217, 218 and 219. Respondent's Exhibit 5, containing invoices 217, 218 and 219 show sales of the jumbo onions for $3.50 per sack, the price quoted by Market News for jumbo yellow Stockton onions sold on the days in question. Respondent gave a $.50 per sack reduction to the purchasers for each invoice. Respondent, however, presented no evidence that such adjustment in price was either warranted, justified or necessary to consummate the sale. This being the case, respondent's negligence violated the terms of the contract. Complainant's claim for all three invoices, totaling $1,425.00, is granted.

Invoice No. 249 involved 400 sacks of complainant's jumbo yellow onions. The original purchaser, State Produce Co., rejected the load, and it was sold to Hudis Produce with the provision, apparently, that the seller pay the freight. The evidence shows that the onions were originally sold by respondent for $4.00 f.o.b. per sack.

Respondent presented no evidence to justify the change in contract terms. We will not infer that State Produce rejected the load on account of condition, or that the final net selling price, $1.86 per sack f.o.b., supports this inference, without credible evidence of that fact. Respondent having failed to present such evidence, complainant is entitled to the selling price of the onions, less the selling commission, inspection and brokerage fees of $178.00, or $1,422.00. Complainant was paid a total of $2,050.80, from which the freight cost of $1,307.20 and selling commission, inspection and brokerage fees of $178.00 was subtracted, for a net payment of $565.60. Complainant is entitled to the difference, $856.40, between what was remitted by respondent and the $1,422.00.

Invoice No. 268 was one of the seven problem loads in which substantial allowances or adjustments were given by respondent to the buyer. Complainant claims a loss of $3,382.00, made up of a loss of $2,200.00 on the 400 sacks of jumbo onions, and an adjustment for freight, which complainant claims is improper, of $1,282.00. Of the seven problem loads, this load is the only one in which there is no destination inspection record. From the documentary evidence submitted in the record, as well as the testimony, the onions were originally shipped to State Produce Co., Newark, New Jersey, rejected by State Produce Co.; diverted to Hudis Produce Co., Inc., Philadelphia, Pennsylvania; rejected by Hudis Produce and diverted to Garden State where they were sold for $.25 per sack. Although we must assume that the opportunity for inspection of the onions arose at all three locations, respondent did not avail itself to take advantage of such an inspection at any of the locations. Although it has been consistently held that a commission merchant does not insure the success of an undertaking or

guarantee against mistakes or errors of judgment, *Cooney & Korshak, Inc. v. M. Trombetta & Sons, Inc.*, 19 Agric. Dec. 890; *C. L. Stratton v. Texas Fruit Co.*, 15 Agric. Dec. 1350; *Cleveland Vegetable Market Co. v. Simon Siegel Co.*, 9 Agric. Dec. 713; and *Samuel George v. Showker Brothers*, 8 Agric. Dec. 702, the commission merchant is held liable where negligence is shown to have occurred. *McRae v. R. Patt Brokerage*, 20 Agric. Dec. 1176 (1976); *Cooney & Korshak, Inc. v. M. Trombetta & Sons, Inc.*, 19 Agric. Dec. 890 (1960); and *Adams v. Joe Phillips, Inc.*, 31 Agric. Dec. 1200 (1972). It is a generally accepted principle of law that an agent must exercise ordinary and reasonable care, diligence and skill in the performance of his duties for his principal, and if he negligently fails to do so, he is liable to his principal for the resultant damages. Respondent did not exercise that ordinary and reasonable care with respect to this invoiced load.

The evidence clearly discloses substantial differences in the degree of decay and condition of the six loads which were inspected at destination. Although all the inspected loads showed more than nominal condition problems, we cannot assume that because six loads had substantially reduced value, the seventh, uninspected load had as substantial a reduced value as the other six. Without an impartial inspection report, we are merely left with self-serving statements. It was negligent for respondent to allow the rejection of this lot of onions without an impartial inspection to determine whether State Produce was justified in its rejection. Because of its negligence in not obtaining an inspection of the onions prior to allowing a substantial reduction in price, respondent is liable for the value of the 400 sacks of jumbo onions.

The Market News summation (Complainant's Exhibit 1) shows Stockton jumbo onions sold for $6.00 per sack on July 13, 1984. This is the date most relevant to load no. 268. The 400 sacks were thus worth $2,400.00. In addition, complainant challenges the deduction for the cost of transportation, $1,182.00, made by respondent in the attempt to sell the 400 sacks of onions. Since the evidence clearly discloses that all of the merchantable onions were sold f.o.b. Stockton, the purchaser paying the freight charge involved, we conclude that the onions were merchantable and the freight charge was not a proper deduction by respondent. Respondent is liable to complainant for a total of $3,582.00.

The onions set forth on invoice nos. 253, 267, 272, 275, 285 and 288, involved the substantial majority of the money in dispute. All six invoiced loads apparently left Stockton with no apparent problems in quality or condition, but arrived at their destination with substantial problems relating to condition, particularly decay and rot. Unlike invoice no. 268, all six of these invoiced onions were inspected, and the inspection certificates clearly show the quality problems involved. Re-

spondent, acting as grower's agent, was apparently required, as a result of the onions' condition, to make substantial adjustments and concessions in price and shipping expenses in order to sell the onions.

Regarding the onions set forth in invoice no. 253, there are two separate destination inspection certificates to cover the entire load of onions, which equals 2000 sacks. One inspection certificate shows decay of from 2 to 7%, average 4% consisting of Bacterial Soft Rot decay in various stages, as well as other condition problems. The other certificate shows decay caused by Bacterial Soft Rot and/or Gray Mold Rot in various stages 10 to 25%, averaging 17%, as well as other condition problems. Both certificates show onions with serious condition problems sufficient to put them outside U.S. grading standards.

The onions of invoice no. 267 were inspected at destination and both the jumbo and medium sized onions were found to have significant condition problems, with decay ranging from 5 to 59% of the onions in the sack, averaging 20% on the medium onions and 40% on the jumbo onions, as well as other condition problems.

As a result of the serious condition problems of both loads of onions, invoice nos. 253 and 267, respondent sold both for nothing, with the buyer paying the transportation. Respondent has filed claims on both invoiced loads with the shipper.

The onions involved on invoice no. 272 also realized significantly less than the original contract price as a result of price adjustments made by respondent because of condition problems with the onions upon arrival at the buyer's location in Massachusetts.

The inspection certificate regarding these onions (CX 10, p. 3) shows an average of 2% damage by Sunscald, with decay ranging from 2 to 10%, average 5% consisting of Bacterial Soft Rot which was mostly in advanced stages. Such condition problems resulted in the onions failing to grade U.S. No. 1. Had the onions graded U.S. No. 1, the Market News price for Stockton jumbo yellow onions for July 13th, the day of shipment, was $6.00 per sack.

As a result of the condition problems with the onions of invoice no. 272, respondent sold the onions for $.90 per sack to Community-Suffolk, Inc., and complainant was paid on the basis of the amount.Respondent filed a claim for the amount of the original sales price relating to this load, with the shipper.

The account of sale for the onions of invoice no. 275 shows that while they were originally sold for a price of $5,250.00, respondent made an adjustment of the entire sales price, in essence selling the onions for nothing, with the buyer, Jos. Fierman, paying for the shipping. The inspection certificate relating to these onions indicates onions with substantial condition problems. The complainant's onions on this invoice were the jumbo onions showing decay ranges of 40 to 56%,

averaging 50%. Under such circumstances, it is understandable why respondent made a price adjustment.

The account of sale for the onions of invoice no. 285 shows that although no pre-shipment sales price was indicated, the 2000 sacks of onions finally sold for $.50 per sack. A grower's agent has no obligation to agree on a price with the buyer prior to the produce being shipped. The condition of the produce might deteriorate from its condition at shipment as it obviously did here, and thus, the market value of the produce would probably decline. Such pre-shipment price would have little meaning. The inspection certificate relating to these onions shows that the onions had substantial condition problems upon arrival. The inspection discloses damage by Sunscald from 4 to 15%, average 9%, including 3% serious damage; decay in most sacks from 23 to 40%, in many from 16 to 18%, average 25%, consisting of Bacterial Soft Rot in various stages. These condition problems would put the onions significantly outside the standings required for grade, and thus respondents need to subsequently reduce the selling price from the price of onions which would have made grade, is understandable. Respondent has filed a claim with the shipper regarding this invoice.

The account of sale for the onions of invoice no. 288 indicates that no pre-shipment price was agreed to by the parties. The inspection certificate relating to these onions shows that these onions also had substantial condition problems upon arrival. The arrival inspection discloses most onions having gray to black surface mold, decay from 31 to 86%, averaging 53%, mostly in early stages, yet the remainder of the stock was firm and dry. After arrival and resorting of the onions, the buyer, Benny Mandel Produce, Inc., sent respondent an accounting which showed that after its expenses in resorting, paying freight, etc., a deficiency existed of $1,277.63 over and above the value of the onions. Respondent filed a claim with the shipper. It is interesting to note that although the inspection certificate, no. F 039497, shows an average of 53% decay, the buyer, after resorting, determined the value of the 2000 sacks of onions to be $5,212.50.

Complainant claims damages in the amount of $536.25 in connection with the sale set forth on invoice no. 270. The amount is computed on the basis of $.65 per sack adjustment granted by respondent to the purchaser, A. Levy Distributing Co., Inc. Respondent presented no credible evidence which would explain or justify the reduction in price. Therefore, such reduction in price is unwarranted and unjustified. Complainant's claim of $536.25 with respect to invoice no. 270 is granted.

Respondent used its best judgment in determining what price was necessary to sell the six loads of complainant's onions which experienced significant condition problems. We will not examine whether

that judgment was right or wrong, whether it would have been smarter to abandon some of the onions to the shipper rather than paying for shipping, or take some other course of action, and whether such action may have resulted in complainant realizing more. The contract gave respondent the authority to use its judgment in selling the onions which obviously had substantial condition problems. Respondent did just that. Although respondent's actions did not constitute negligence with respect to the six loads which were inspected and found to have significant condition problems, the record does not show the respondent to have been particularly aggressive in representing the sellers with respect to problem merchandise. The record evidence implies that many of the "distressed" shipments had values significantly in excess of the amounts respondent was able to negotiate for them. The testimony of respondent's management seemed to convey a sense of powerlessness against the "big bad buyers" located across the country – meekly accepting and complying with the buyers' demands, whether justified or not. Respondent's obligation under the Act is to represent the interest of seller/grower aggressively and completely. The record raises serious questions as to respondent's ability or desire to do that.

Complainant did not realize the substantial amounts of money it would have had the onions arrived in the condition they were shipped. But those "losses" were not as a result of negligence on the part of respondent. An agent does not insure the success of the seller's undertaking or guarantee against mistakes or errors of judgment. *Cooney & Korshak, Inc. v. M. Trombetta & Sons, Inc.*, 19 Agric. Dec. 890; *Northwood Fruit Co. v. Coop Producers, Inc.*, 15 Agric. Dec. 149 (1954); and *Adams v. Joe Phillips, Inc.*, 31 Agric. Dec. 1200 (1972). Complainant's claims with respect to invoice nos. 253, 267, 272, 275, 285 and 288 are denied.

Respondent's negligence was responsible for complainant's loss of $6,437.15. Respondent's negligence in failing to obtain that extra amount from the buyers and pay it to complainant is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

Order

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $6,437.15 with interest thereon at the rate of 13% per annum from August 1, 1983, until paid.

Copies of this order shall be served upon the parties.

STATE PRODUCE BROKERS, INC. v. THE GUY C. PANNO COMPANY, INC.

PACA Docket No. 2-6865

STATE PRODUCE BROKERS, INC. v. THE GUY C PANNO CO , INC

Decision and order filed April 13, 1987.

Question of whether a sale or consignment.

Respondent's contention that 530 cartons of cucumbers shipped to it were consigned, not sold, held not credible in view of fact that amount respondent remitted on account of 188 of them was exactly the amount per carton which complainant charged.

John J. Casey, Presiding officer

Complainant, pro se.

Respondent, pro se.

Decision issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended, 7 U.S.C. 499a *et seq.* A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $3,405.00 in connection with a shipment of cucumbers in foreign commerce.

A copy of the report of investigation prepared by the Department was served on each party A copy of the formal complaint was served on respondent, which filed an answer thereto denying liability.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice, 7 U.S.C §47.20, is applicable. Pursuant to that procedure, the report of investigation is considered a part of the evidence, as are the verified complaint and answer. Each party was given notice of opportunity to submit additional evidence in the form of verified statements, and to file briefs. Complainant and respondent each submitted such evidence. No brief was received

Findings of Fact

1. Complainant at all times material herein was a corporation with a place of business at Los Angeles, California and licensed under the Act.

2. Respondent at all times material herein also was a corporation with a place of business at Los Angeles and licensed under the Act.

3. on Tuesday, September 4, 1984, a truckload consisting of 530 cartons of cucumbers arrived at respondent's place of business in Los Angeles, California in good condition, which complainant had caused to be shipped from Surrey, B.C., Canada.

4. Complainant issued to respondent an invoice reflecting a sale of the 530 cartons at $8.50 per carton, a total of $4,505.00, delivered at Los Angeles.

5. On Friday, September 14, 1984, respondent delivered 342 of the same cartons of cucumbers to a warehouse, also in Los Angeles, cho-

sen by complainant. The warehouse charged $498.00 for storing them. Thereafter, no proceeds were realized on sale of those cucumbers.

6. Respondent had paid complainant a total of $1,598.00 on account of the above.

7. A formal complaint was received by the Department on April 1, 1985, which was within nine months of accrual of the cause of action alleged therein.

Conclusions

A truckload consisting of 530 cartons of cucumbers was caused by complainant to be shipped from Surrey, B.C., Canada to respondent's place of business in Los Angeles, California, arriving in good condition on Tuesday, September 4, 1984. Ten days later, on Friday, September 14, 342 of the cartons were delivered by respondent to a warehouse, also in Los Angeles, chosen by complainant. That warehouse charged $498.00 for storing them. Thereafter, no proceeds were realized upon sale of those 342, due to spoilage. Complainant sent respondent an invoice charging $8.50 per carton, a total of $4,505.00, for the 530 cartons. Respondent paid complainant $1,598.00. This much is undisputed. Simple arithmetic shows that the cartons which respondent received on September 4 but did not deliver 10 days later to the warehouse chosen by complainant numbered 188 (530 - 342), and that the $1,598.00 which respondent paid is 188 multiplied by $8.50.

Complainant contends that the shipment of 530 cartons to respondent's place of business was a sale at $8.50 per carton delivered at Los Angeles; respondent contends that it was a consignment. Complainant contends that the delivery by respondent of 342 of them to the warehouse chosen by complainant was under an agreement to sell for respondent's account goods owned by respondent; respondent contends that it was a return to complainant of goods owned by complainant which had been consigned by had not been sold. Both positions were supported by written evidence submitted under the shortened procedure, without oral hearing.

Respondent's position is not credible, in view of the fact that its remittance of $1,598.00 to complainant amounts to exactly $8.50 per carton for the 188 which it received on September 4 but did not deliver 10 days later to the warehouse chosen by complainant. That the 530 cartons were consigned to respondent, but that 188 of them brought a net price after respondent's commission of exactly the amount per carton which complainant charged respondent, is too incredible to believe.

Recapitulating the above:

530 cartons at $8.50 delivered at Los Angeles:	$4,505.00
storage of 342 cartons for respondent's account:	498.00
total:	5,003.00

paid by respondent:	(1,598 00)
due:	$3,405.00

On the basis of the above, respondent's failure to pay in full for the cucumbers, including the cost of storing them for its account, is found to be a violation of Section 2 of the Act, 7 U.S.C. 499b, for which reparation should be awarded with interest.

Order

Within 30 days of the date of this order, respondent shall pay to complainant as reparation $3,405.00 with interest thereon at the rate of 13% per annum from October 1, 1984 until paid.

Copies of this order shall be served on the parties.

SUNRISE PRODUCE, INC. v. TOM LANGE PRODUCE, INC.

PACA Docket No. 2-7235

Decision and order filed April 24, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $204,488.00 in connection with a transaction involving onions.

A copy of the formal complaint was served on respondent which filed an answer denying any liability to complainant. On March 24, 1987, complainant moved for dismissal of the action in order to pursue its claim in another forum.

Therefore, the complaint is hereby dismissed with prejudice.

Copies of this order shall be served upon the parties.

SUNWORLD PACKING CO. OF WASHINGTON, INC. v. M. L. GALLOWAY INTERNATIONAL, INC.

PACA Docket No. 2-7409

Decision and order filed April 7, 1987.

Andrew Y. Stanton, Presiding officer

Complainant, pro se.

Respondent, pro se.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER VACATING ORDER REOPENING AFTER DEFAULT AND DEFAULT ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $7,245.00 in connection with a shipment of apples in interstate commerce. A copy of the formal complaint was served upon respondent, which failed to file an answer thereto and was thus in default. Prior to the issuance of a default order, respondent moved to reopen and, on January 23, 1987, an order was issued reopening after default. Respondent was given 10 days from its receipt of such order to file an answer. Although respondent received the order on January 31, 1987, it has failed to file its answer. Therefore, the order reopening after default is hereby vacated. The issuance of an order without further procedure is now appropriate, pursuant to section 47.8(c) of the Rules of Practice (7 C.F.R. 47.8(c)).

Complainant, Sunworld Packing Co., of Washington, Inc., is a corporation whose address is Warehouse 6, Box 4, Pasco, Washington. Respondent, M. L. Galloway International, Inc., is a corporation whose address is 180 North Main, Suite G, Porterville, California. At the time of the transaction involved herein, respondent was licensed under the Act

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $7,245.00. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $7,245.00, with interest thereon at the rate of 13 percent per annum from November 1, 1986, until paid.

Copies of this order shall be served upon the parties.

TANIMURA & ANTLE v. INTERCOAST MARKETING, INC.

PACA Docket No. 2-7424

Order filed April 14, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A

timely complaint was filed in which complainant seeks reparation against respondent in the amount of $1,111.50 in connection with a transaction involving the shipment of lettuce in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated March 17, 1987, complainant notified the Department that it wished to dismiss the complaint. Complainant, in its letter of March 17, 1987, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

WHIZPAC, INC. v. FRANKLIN PRODUCE CO., INC.

PACA Docket No. 2-6997

Decision and order filed April 10, 1987.

Modification of contract—Open price term—Reasonable value-shown by original contract price.

It was found that complainant had sold tomatoes to respondent at a f.o.b. price and subsequent to complaint by respondent after arrival, agreed to a modification of the contract to call for sale on a open price basis. However, no agreement as to price was subsequently reached and, in view of the Federal inspection several days following arrival showing good delivery, it was found that the original contract price constituted a reasonable price for purposes of the open price agreement, and complainant was awarded such amount, less the amount already paid, as reparation.

George S. Whitten, Presiding officer.

Complainant, pro se.

Respondent, pro se

Decision issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $5,070.00 in connection with the shipment in interstate commerce of a partial truckload of tomatoes.

Copies of a report of investigation and a supplemental report of investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complaint.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in sec-

tion 47.20 of the rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as are the Department's reports of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant did not file an opening statement. Respondent filed an answering statement. Neither party filed a brief.

Findings of Fact

1. Complainant, Whizpac, Inc., is a corporation whose address is 1630 Orleans Court, Marco Island, Florida.

2. Respondent, Franklin Produce Co., Inc., is a corporation whose address is State Farmers Market, Unit #62, Columbia, South Carolina. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On or about January 21, 1985, complainant sold to respondent one truckload of tomatoes in the following quantities, sizes, grades and prices on an f.o.b. basis:

44	5x6	Comb.	@ $12.00 or	$ 528.00
81	6x6	Comb.	@ $11.00 or	891.00
52	6x7	Comb.	@ $ 9.00 or	468.00
80	7x7	Comb.	@ $ 8.00 or	640.00
100	7x7	Comb.	@ $ 7.00 or	700.00
3	5x6	#3s	@ $ 7.00 or	21.00
56	6x6	#3s	@ $ 6.00 or	336.00
99	6x7	#3s	@ $ 5.00 or	495.00
120	5x6	#3 pinks	@ $ 4.00 or	1,200.00
108	6x6	#3 pinks	@ $ 9.00 or	
57	6x7	#3 pinks	@ $ 7.00 or	
50	7x7	#3 pinks	@ $ 6.00 or	

4. Between January 21, and Jar
Federally Inspected at shipping p
grades specified in the contract rel
tomatoes were shipped from loadir
Columbia, South Carolina, on Janu
respondent on arrival.

5. Following arrival of the tomat
the broker, Jerry G. Simmons of M
Corp., about the condition of the
that the tomatoes could be handle
basis.

6. On January 30, 1985, at 1:15 p.m., the 850 cartons of tomatoes were Federally inspected at respondent's place of business with the following results, in relevant part:

Condition of Load: Palletized, applicant's warehouse, abovementioned address.

Condition of Pack: Mostly well, some fairly well filled.

Temperature of Product: Various locations: 54 to 78 degrees F.

Condition: Average approximately 40% green and breakers, 15% turning and pink, 40% light red to red. Decay averages 3%. In most cartons 26 to 54%, in some cartons 4 to 10%, average 28% damage by sunken discolored areas generally occurring over shoulders.

7. Respondent has paid complainant $2,000.00.

8. The formal complaint was filed on August 19, 1985, which was within nine months after the cause of action herein accrued.

Conclusions

Respondent alleges as a defense to complainant's action for the price of the tomatoes that an agreement was entered into subsequent to acceptance of the tomatoes under which respondent was allowed to handle the tomatoes on an open price basis. The broker agrees with respondent's contention in regard to this agreement. Both respondent and the broker allege that the contract was negotiated on complainant's behalf by Chet Warford, and complainant nowhere disputed this allegation. In addition, complainant did not submit at any point in these proceedings an affidavit from Chet Warford denying respondent's allegations in regard to the open price agreement. We conclude on the basis of all of the evidence that the contract was modified following arrival and acceptance of the tomatoes to call for an open price agreement.

Respondent nowhere elaborates on what was meant by the term "open price." The Uniform Commercial Code, Sec. 2-305, deals with

tomatoes at the time of arrival. Although the record does not disclose the exact arrival time, the distances involved should have required only one day of transit. However, this problem is mooted due to the fact that the Federal inspection at destination shows that the tomatoes at the time of inspection made good delivery for tomatoes sold as U.S. Combination or U.S. #3. *See*, 7 C.F.R. § 51.1861(b) and (d). Respondent did not submit any data concerning the resale of the tomatoes, so there is no evidence in the record showing a prompt and proper resale. Under the circumstances, we find that the reasonable value of the tomatoes was the original contract price, or $7,070.00. Respondent has already paid complainant $2,000.00 of this amount, which leaves $5,070.00 due and owing from respondent to complainant. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

It is noted that respondent appears to additionally and inconsistently maintain in its answer that the tomatoes were originally sold on an open basis. We have considered this contention and in view of the prompt invoice sent by complainant and the lack of evidence of any prompt reply objecting to such invoice on the part of respondent, we have found that the tomatoes were sold at the f.o.b. prices set forth in the Findings of Fact.

Order

Within 30 days of the date of this order respondent shall pay to complainant, as reparation, $5,070.00, with interest thereon at the rate of 13% per annum from February 1, 1985, until paid.

Copies of this order shall be served on the parties.

WOLVERINE FRUIT CO. v. GEORGE VILLALOBOS, d/b/a TEK-SUN BRAND INTERNATIONAL

PACA Docket No. 2-6905

Decision and order filed April 29, 1987.

Market News as indicative of market price—Agency,duties—Damages, proof.

Complainant imported, repacked and distributed Mexican watermelons for respondent. The parties disagreed as to the price and related costs. Price was determined on basis of Market News reports, and related costs were actual costs sustained by complainant.

George S. Whitten, Presiding officer.

Tom Wilkens, McAllen, Texas, for complainant.

Alfred Perez, San Jose, California, for respondent.

Decision issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $21,026.73 in connection with the shipment in interstate and foreign commerce of 10 truckloads of watermelons.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant. Respondent also filed a counterclaim in the total amount of $40,529 12 arising out of the same transactions as were the subject of the informal complaint. Complainant did not file a reply to the counterclaim and the allegations thereof are deemed to be denied pursuant to the provisions of section 47.9(c) of the Rules of Practice (7 C.F.R. § 47.9(c)).

Although the amounts claimed in both the complaint and counterclaim exceed $15,000, the parties waived oral hearing, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C F.R § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements, however, neither party did so. Neither party filed a brief.

Findings of Fact

1. Complainant, Wolverine Fruit Company, is a partnership whose address is P. O. Box 2642, McAllen, Texas. At the time of the transactions involved herein complainant was operating subject to license under the Act

2. Respondent is an individual, George Villalobos, doing business as Teksun Brand International, whose address is 1865 Decatur Drive, San

ornia. At the time of the transactions involved herein re-

vas licensed under the Act.

to April 22, 1984, complainant and respondent agreed that would purchase loads of watermelons in Mexico, and trans-

.o the Mexican side of the border, where complainant would

nsibility for importing the melons and their subsequent distri-

parties in the U.S.A., one of which parties would be respon-

as agreed that complainant would account to respondent for

nelons, deducting packing costs, commissions, customs fees,

, and remit the net proceeds to respondent. It was later

agreed that no commission would be charged on the melons which were distributed by complainant to respondent.

4. On or about April 22, 1984, respondent purchased in Mexico, and transported to the Mexican side of the border, one truck load containing 49,951 pounds of Grey watermelons. Complainant imported this load on April 23, 1984, assigned it lot #201, caused it to be packed, and on April 25 through 28, 1984, caused 47,454 pounds of the melons to be distributed to various buyers other than respondent for gross proceeds of $6,326.98. The remaining poundage was assigned by complainant to shrinkage. Charges, including a 12 percent commission of $759.24, amounted to $4,249.40, leaving net proceeds reported as $2,077.58.

5. On or about April 22, 1984, respondent purchased in Mexico, and transported to the Mexican side of the border, one truck load containing 30,613 pounds of Green Peacock watermelons. Complainant did not import this load until April 27, 1984. Complainant assigned the load lot #202, caused the load to be packed, and on April 28, 1984, shipped 30,300 pounds of the melons under complainant's invoice No. T-1615 to respondent in San Jose, California. The remaining poundage was assigned by complainant to shrinkage. Complainant showed this load in its accounting as sold for gross proceeds of $4,242. Charges, including a 12 percent commission of $509.04, amounted to $2,948.15, leaving net proceeds reported as $1,293.85. In addition to the 30,300 pounds of watermelons mentioned above this load also contained 10,262 pounds of Jubilee watermelons billed to respondent by complainant at $.16 a lb., or $1,641.92. These melons were not included in complainant's accountings.

6. On or about April 26, 1984, respondent purchased in Mexico, and transported to the Mexican side of the border, one truck load containing 48,576 pounds of Green Peacock watermelons. Complainant failed to import this load, and respondent, after discovering on May 1, 1984, that the load had not been imported, had to send his own representative to cross the load. This was accomplished on or about May 2, 1984. Complainant assigned the load lot #204, caused the load to be packed, and on or about May 4, 1984, 39,900 lbs. of the load were shipped to respondent in San Jose, California, under complainant's invoice No. T 1713, billed at $.12 per lb., in a shipment containing other melons from complainant's lot No. 205. Other parties were shipped 6,247 lbs. at $.08 per lb.. The remaining poundage was assigned by complainant to shrinkage. Gross proceeds were reported as $5,287.76 and charges, including a 12 percent commission of $634.53, were reported as $3,648.43, leaving net proceeds reported as $1,639.33.

7. On or about April 26, 1984, respondent purchased in Mexico, and transported to the Mexican side of the border, one truck load

containing 55,484 pounds of Green Peacock watermelons. Complainant failed to import this load and respondent, after discovering on May 1, 1984, that the load had not been imported, had to send his own representative to cross the load. This was accomplished on or about May 2, 1984. Complainant assigned the load lot #205, caused the load to be packed, and on or about May 4, 1984, 46,000 lbs. of the load were shipped to respondent under complainant's invoice No. T 1616, billed at $.12 per lb.; 2,400 lbs. of the load were shipped to respondent under complainant's invoice No. T 1713 at $.12 per lb.; and 4,310 lbs. of the load were shipped to other parties at $.08 per lb.. The remaining poundage was assigned by complainant to shrinkage. Gross proceeds were reported as $6,152.80 and charges, including a 12 percent commission of $738.34, were reported as $4,177.16, leaving net proceeds reported as $1,975.64.

8. On or about April 27, 1984, respondent purchased in Mexico, and transported to the Mexican side of the border, one truck load containing 51,953 pounds of Green Peacock watermelons. Complainant failed to import this load and respondent, after discovery on May 1, 1984, that the load had not been imported, sent his own representative to cross the load. This was accomplished on or about May 2, 1984. Complainant assigned the load lot #206, caused the load to be packed, and on or about May 5, 1984, 45,836 lbs. of the load were shipped to respondent under complainant's invoice No. T-1695 at $.12 per lb.; and 3,520 lbs. of the load were shipped to other parties at $.08 per lb.. The remaining poundage was assigned by complainant to shrinkage. Gross proceeds were reported as $5,781.92, and charges, including a 12 percent commission at $693.83, were reported as $3,843.81, leaving net proceeds reported as $1,938.11.

9. On or about April 27, 1984, respondent purchased in Mexico, and transported to the Mexican side of the border, one truck load containing 31,878 pounds of Green Peacock watermelons. Complainant failed to import this load and respondent, after discovering on May 1, 1984, that the load had not been imported, sent his own representative to cross the load. This was accomplished on or about May 2, 1984. Complainant assigned the load lot #207, caused the load to be packed, and on or about May 3, 1984, 22,900 pounds of the load were shipped to respondent under complainant's invoice No. T-1694, and on May 5, 1984, 1,964 pounds to respondent under complainant's invoice No. T-1695, both at $.12 per lb.. Other parties were shipped 1,255 pounds at $.1375; 1,596 lbs. at $.1350; and 2,345 pounds at $.08. The remaining poundage was assigned by complainant to shrinkage. Gross proceeds were reported as $3,559.30, and charges, including a 12 percent commission at $427.12, were reported as $2,483.66, leaving net proceeds reported as $1,075.64.

10. On or about April 27, 1984, respondent purchased in Mexico, and transported to the Mexican side of the border, one truck load containing 26,411 pounds of Green Peacock watermelons and 3,300 pounds of Grey watermelons. Complainant imported this load on April 27, 1984, assigned the load lot #208, caused the load to be packed, and on or about May 3, 1984, shipped 20,000 lbs. of the melons to respondent under complainant's invoice No. T-1694 at $.12 per lb.. Other parties received 1,139 pounds at $.1375 and 7,663 pounds at $.16. The remaining poundage was assigned by complainant to shrinkage. Gross proceeds were reported as $3,782.69, and charges, including a 12 percent commission at $453.92, were reported as $2,539.45, leaving net proceeds reported as $1,243.24.

11. On or about April 28, 1984, respondent purchased in Mexico, and transported to the Mexican side of the border, one truck load containing 56,210 pounds of Grey Watermelons. Complainant imported this load at an unknown time, assigned the load lot #209, caused the load to be packed, and on or about May 3, 1984, shipped 53,405 pounds of the melons to parties other than complainant at prices ranging from $.10 to $.16 per lb.. The remaining poundage was assigned by complainant to shrinkage. Gross proceeds were reported as $7,191.17, and charges, including a 12 percent commission at $862.94, were reported as $5,309.45, leaving net proceeds reported as $1,881.72.

12. On or about May 2, 1984, respondent purchased in Mexico, and transported to the Mexican border, one truck load containing 20,570 pounds of Grey watermelons and 36,300 pounds of Green Peacock watermelons. This load was imported on May 2, 1984, found to be in poor condition, and returned to Mexico. Complainant in its accounting reported the load as not received and reported charges as follows Robert F. Barnes - $738.83 Ck. #3971; Robert F. Barnes (Frt) - $1,525.64 Ck. #3686; Jaime Cantu de Luna - $99.13 Ck. #4023; Jaime Cantu de Luna - $41.36 Ck. #4023.

13. On or about May 2, 1984, respondent purchased in Mexico, and transported to the Mexican border, one truck load containing 60,585 pounds of Grey watermelons. This load was imported on May 2, 1984, found to be in poor condition, and returned to Mexico. Complainant in its accounting reported the load as not received and reported charges as follows: Robert F. Barnes - $768.43 Ck. #3971; Robert F. Barnes (Frt) - $1,595.67 Ck. #3686; Jaime Cantu de Luna - $105.54 Ck. #4023; Jaime Cantu de Luna - $44.04 Ck. #4023.

14. On or about May 9, through 17, 1984, complainant consigned to respondent 317,169 pounds of Grey watermelons as to which respondent reported, but has not paid, net proceeds in the total amount of $1,869.29.

15. On or about May 7, 1984, the 46,000 pounds of watermelons shipped to respondent and covered by finding of fact 7, arrived at respondent's place of business in San Jose, California and at 11:40 a.m. on that date were Federally inspected while still on the truck with the following results in relevant part:

Condition of Equipment: Temperature control unit not in operation. Metal ribbed floor. Doors closed.

Products Inspected: Long Green WATERMELONS in bulk. Applicant states 46,000 lbs. of Mexico stock.

. . .

Temperature of Product: Through lengthwise load, 15 rows, 6 layers. STOCK NEAREST REAR DOORS: Top layer 69°F. Bottom layer 78°F. 1/2 LENGTH: Top layer 50°F. STOCK NEAREST FRONT: Top layer 52°F. Bottom layer 52°F.

. . .

Quality: Mature, clean, mostly fairly well, some well formed, rind characteristic color and flesh good red color. Grade defects range from 2 to 5 melons per sample, average 20% misshapen and scars.

Condition: Mostly firm. From 1 to 3 melons per sample, average 8% damage by soft ends affecting blossom end. From 1 to 3 melons per sample, average 11% overripe. Average 1% decay.

Grade: Fails to grade U.S. No. 1 account of grade defects in excess of tolerance.

16. On or about May 8, 1984, the 47,800 pounds of watermelons shipped to respondent under complainant's invoice No. T-1695, and covered by findings of fact 8 and 9, and the 42,300 pounds of watermelons shipped to respondent under complainant's invoice No. T-1713 and covered by findings of fact 6 and 7, arrived at respondent's place of business in San Jose, California. At 10:30 a.m. on May 9, 1984, 47,800 pounds of melons remaining from the two loads were Federally inspected after having been unloaded into respondent's warehouse with [illegible] relevant part:

Long Green WATERMELONS in bins narks. 32 bins noted. Applicant states ico stock. See "Remarks."

. . .

Temperature of Product: Various locations: 68°, 70°, 70°F.

. . .

Quality: Mature, clean, well formed, rind characteristic color, flesh good red color. Grade defects average 2% scars.

Condition: From 3 to 10 melons per sample, average 38% overripe. Average 6% damage by sunburn. No decay in most samples, in many 8 to 10 decayed melons, average 18% Stem End Rot in advanced stages. Remainder of melons firm.

Grade: Meets quality requirements but fails to grade U.S. No 1 only account of condition.

Remarks: Applicant states above lot is the remainder of two loads of melons totaling 90,100 lbs.

17. The Texas Vegetable Report, Weslaco, Texas, a Federal-State Market News publication, gives the following quotations per lb. for watermelons in cartons - "MEXICO CROSSINGS PRICES F.O.B. SOUTH TEXAS BASIS DUTY & CROSSINGS CHARGES PAID," on the following dates:

April 25, 1984	Jubilee	3-4s few .17-.18
	Long Gray	3-4s .15-.16; few .17 5-6s.13-.14 mostly .14
April 30, 1984	Jubilee	3-4s .16 5-6s few .16
	Long Gray	3-4s .14-.15, mostly .14, 5-6s .12-.13, few .14
May 1, 1984	Jubilee	3-4s .16; 5-6s .14
	Long Gray	3-4s .14-.15, mostly .14; 5-6s .12-.13, mostly .12
May 2, 1984	Jubilee	3-4s .16
	Long Gray	3-4s .14-.15 mostly .14; 5-6s .12-.13 few .14

18. The informal complaint was filed on January 21, 1985, which was within nine months after the causes of action herein accrued.

Conclusions

This case presents us with the anomalous circumstance of a sale by complainant to respondent of goods as to which respondent, rather than complainant, possessed the title. Briefly, what occurred was a consignment of melons by respondent to complainant, and a subsequent sale of a portion of the same melons by complainant to respondent. Complainant impliedly acknowledges its duty to account to respondent for the disposition of all of the melons. While respondent in its answer denied "having contracted or purchased" the melons from complainant, there is no evidence of any objection to the invoices at the time of the sale, and respondent's defense, as well as the basis of his counterclaim, rests upon the contention that complainant failed to act in accord with its contractual duty to cross the melons from Mexico into Texas in an expeditious manner resulting in damage to the melons and monetary loss to respondent.

The informal complaint, which is the statutory complaint for purposes of tolling the statute of limitations, (See 10 Harl, *Agricultural*

Law § 72.10[2][c] at footnote 41 (1983)) states a broader basis of claim than that stated in the formal complaint. The formal complainant merely alleges the sale of specific quantities of watermelons at specific prices to respondent. The informal complaint states in relevant part as follows:

> Enclosed please find two copies each of my bills of lading, invoices and the watermelon final accounting pertaining to the attached statement. To date we have not been able to collect any of these invoices or make any settlement on the watermelon accounting. I have talked with Mr. George Villalobos of Teksun Brand International on numerous occasions with no result.

The formal complaint had attached to it copies of invoices directed to respondent together with corresponding bills of lading. Attached to the informal complaint were the above mentioned invoices and bills of lading, and in addition, a summary accounting showing a total of 354,376 pounds of watermelons received by complainant from respondent, 338,234 pounds packed and shipped to respondent and others, and net returns of $8,206.48. Also attached to the informal complaint were detailed accountings compiled by complainant, and denominated "SETTLEMENT", covering each of the 10 truck loads of melons purchased by respondent in Mexico. While the informal complaint thus states a broader basis for complainant's claim, it also reveals the true nature of the complex mixture of transactions between the parties to this proceeding, and together with the counterclaim (which clearly alleges matters arising out of the transactions which are the subject of the informal complaint) shows any recovery by complainant from respondent must take into consideration complainant's duty to account to respondent for melons received from respondent on what was obviously a consignment basis.

Complainant filed an informal complaint to which respondent replied by outlining his basic defense as stated above. Complainant then filed

ade no reference to respondent's defense
uld constitute a rebuttal thereto. This
's evidentiary submissions in this pro-
again raised his defense, providing
entation, in his counterclaim. While
d counterclaim, viewed as pleadings,
.F.R. § 47.9) the evidence contained
§ 47.20(a)) is unrebutted on this re-
unted by us because of some inherent
ction, such evidence must be deemed
he points which it supports. Unfortu-
often incoherent, and very difficult to
nt of the documentation was in Span-

ish, with no translation supplied. The Spanish documents were not considered in reaching our decision herein.

To place in perspective the transactions involved in this proceeding, and leaving aside for the moment those transactions which are covered by finding of fact 14 concerning which there is really no dispute, the following summary may be helpful. According to the figures supplied by both parties (a discrepancy exists only as to the last load and as to such load we have accepted respondent's figures) a total of 471,834 pounds of respondent's melons were crossed into the U.S. The last two loads containing a total of 117,458 lbs. were sent back into Mexico because of poor condition. This leaves a net of 354,376 pounds received by complainant. 338,234 pounds were packed at complainant's direction, the remaining 16,142 pounds, or approximately 4 1/2 percent being lost, according to complainant, due to "shrinkage." 209,300 pounds were shown by complainant's accounting as sold to respondent for prices that averaged $.12289 per lb. or $25,722. Complainant's accounting showed the remaining 128,934 pounds as being sold to other parties at prices which averaged $.12876 per lb. or $16,602.62. An additional 10,262 pounds of Jubilee watermelons contained in 129 ctns. were invoiced by complainant to respondent for $.16 per lb., or $1,641.92, on its first invoice T-1615. These melons were also shown on the bill of lading but were not shown on complainant's accounting. Complainant, in its formal complaint, sought to recover $21,026.73 from respondent. Its invoices to respondent, including the 10,262 pounds of Jubilee melons mentioned above, and also including $1,869.29 for the melons covered by finding of fact 14, totaled $29,233.21. The $21,026.73 figure claimed in the complaint apparently was arrived at (complainant did not bother to explain this) by deducting the $8,206.48 shown by its accountings as the total net proceeds of the 10 truck loads crossed from Mexico, from the $29,233.21 figure which was the total of its invoices to respondent. This of course means that, though complainant's accountings show the $8,206.48 as "NET RETURN," such amount was impliedly not received by complainant, but was only the net which would remain after deducting expenses and commission from the amounts which it billed. Thus explained, apart from the 10,262 pounds of melons invoiced but not included in the accountings, and taking into account the peculiar nature of the transactions between the parties, complainant's claim makes perfect sense.

Respondent contends that he entered into a contract with complainant under which complainant was to receive approximately 20,000,000 pounds of watermelons purchased by respondent in Mexico. Respondent was to transport the commodity to the Mexican side of the border at McAllen, Texas, and complainant was to cross the product into the U.S., pay for the freight and charges by customs, have the product

packed at cost (estimated to be approximately 2 1/2 to 3 1/2 cents per lb.), and pay for the transfer of the commodity from one truck to another. Respondent states that complainant "was to keep some of the perishable commodity and the balance shipped to Teksun Brand, in San Jose, California." In addition respondent contends that the parties agreed to a modification of the contract under which no commission would be charged on product shipped to respondent. Since this contention was not rebutted by complainant we take it as the established agreement between the parties. Furthermore we do not conclude (because to do so would involve pure speculation on our part) that the agreement in regard to complainant's foregoing commission, accomplished a novation of the original contract so as to resolve any other issues that might exist between the parties.

Respondent's basic defense is that complainant mishandled the melons by failing to cross and ship the melons in a timely fashion. Respondent's evidence shows that a substantial portion of the melons were allowed to sit in the hot sun (at temperatures of 100- to 119-F) on the Mexican side of the border for extended periods of time ranging up to six days, and that ultimately most of the trucks were in fact crossed by respondent instead of by complainant as called for in their contract. In view of the fact that respondent's evidence in this regard is not rebutted we accept such evidence and conclude that it shows a breach of contract on the part of complainant. Allowing the melons to sit in the sun for extended periods of time would have an adverse effect on the condition of the melons and thus lower the price which could be reasonably asked for the melons. Delays in shipping the melons would have a similar though presumably less pronounced effect. In addition shipping point Federal–State Market News reports for the period in question show generally falling prices which would decrease the return on the melons. In view of these factors we have concluded that the most reasonable method of assessing damages for complainant's breach, is to

erwise be chargeable to respondent under his consignment contract with complainant. We have concluded that respondent should remain liable for any excess of allowable expenses over returns for two reasons. First, such is the normal expectation in a consignment contract, and second, respondent was apparently at all times acquiescing in complainant's continued handling of the melons. Respondent even accomplished the crossing of most of the melons, after complainant had failed to cross them in a timely fashion, and subsequent to the late crossing of such melons respondent placed the melons in complainant's hands to handle on consignment.

There remains the question of what damages, if any, respondent should be allowed against the purchase price on the melons which he received in San Jose. Respondent's counterclaim makes allegations such as the following:

> That complainant's negligence in not performing his agreed duties and responsibilities, caused the loss of two loads of watermelons, which had to be dumped or reconditioned because of spoilage condition the product was in . . . .
>
> . . .
>
> Complainant shipped respondent a total of five loads of watermelons. Load 1694 was sold to the trucker, due to an accident. Another load, was donated to the Food Bank. Out of the remaining three loads, 25 tons had to be reconditioned. . . .
>
> . . .
>
> Respondent on this counter complaint will show that complainant cost respondent the loss of 183,805 lbs. of the perishable commodity "watermelon" for no-good-reason, when the product was under complainants control . . . .

The poundage referred to in the last quotation above cannot be correlated with the two loads sent back into Mexico. Nor does it correlate with with those two loads plus the shrinkage. Nor does it correlate with three loads covered by the Federal inspections quoted in Findings of fact 15 and 16. As to the other two statements quoted above, except for the reference to "load 1694," it is impossible to correlate respondent's references to particular loads of melons. Of course the transit accident referred to in regard to load 1694 would, in a f.o.b. sale, be respondent's responsibility. At any rate respondent gave no data as to the proceeds of the sale of the load. Neither did respondent give data as to the disposition and proceeds of the other loads referred to, assuming they could be correlated with particular loads. We are left with only the data on the two Federal inspections furnished by respondent.

The inspection quoted in Finding of Fact 15, even though it should probably be taken to show a failure to make good delivery, does not disclose such type or degree of damage as would allow us to assess damages on the basis of the percentage of the delivered cost of the load

corresponding to the percentage of defects or decay. See *Arkansas Tomato Co., v. M-K & Sons Produce Co.*, 40 Agric. Dec. 1773 (1981) and *Ellgren & Sons v. Wood Co.*, 11 Agric. Dec. 1032 (1952). The inspection quoted in finding of fact 16 covers only approximately one-half of the two loads, and likely relates to the worst melons of the two loads such as would have been left after the best were picked out and sold. When the damage disclosed by the inspection is related to the entire 90,100 pounds, the same problem in regard to type and degree of damage is found to exist. For these reasons we are unable to award damages in respondent's favor against the cost of the melons received in San Jose. See *Anthony Brokerage, Inc., v. The Auster Company, Inc.*, 38 Agric. Dec. 1643 (1979).

Comparing complainant's accountings with complainant's invoices, in every case which we could check (no invoices or bills of lading were submitted covering product shipped to parties other than respondent) the "Receipts Date" on the accountings corresponded to the invoice date on the invoices. In all cases except one the shipping date was one day earlier than the invoice date - "Receipt Date," and on that one it was two days earlier. We conclude therefore that the "Receipt Date" on respondent's accountings was the invoice date, and that it was respondent's practice to invoice approximately one day following shipment of produce.

The record shows that the melons could easly have been crossed by respondent within one day after arrival at the Mexican side of the border. One load was actually crossed on the same day that it arrived. The record also shows that packing could have easly been accomplished and shipments made within two days after the loads were crossed. On this basis, but taking into account any intervening weekend, we have assigned to each load a date by which all shipments should have been completed. In general we have assessed damages for all shipments made after this date, based on the difference between market price on the computed date and actual sale price on the date of late shipment.

We will now discuss and determine the amounts owing as to each load separately. The basic facts in regard to the first load are set forth in finding of fact 4. The load arrived at the border on the 22nd, was crossed on the 23rd, and should have been shipped by the 25th. Most of the load was shipped by the 25th. However, the record shows that 10,522 pounds of size 4 melons were shipped on the 26th at a price of $.14 per lb.. On the 27th 436 pounds of size 4 were shipped at a price of $.115 per lb. and 2,613 of size 4 at $.10 per lb.. We find that complainant's failure to ship the melons on the 25th was a breach of its contract with respondent. Gross proceeds from the sale of the watermelons as shown by complainant's accounting were $6,326.98, all of

which was paid to complainant by parties other than respondent. If we assign the April 25 market price of $.16 per lb. to the melons shipped on the 26th and 27th these gross proceeds must be increased by $411.29 to $6,738.27. Expenses including a 12% commission on the recomputed figure would amount to $4,298.75. This amount deducted from the gross proceeds leaves net proceeds of $2,439.52 owing from complainant to respondent.

The second load is covered by finding of fact 5. This load arrived at the border on the 22nd, was not crossed until the 27th, and was shipped on the 28th. The load should have been shipped by the 25th. Complainant's accounting as to this load showed 30,300 pounds of Green Peacock watermelons shipped to respondent at $.14 per lb.. We find that complainant breached its contract as to these melons by waiting approximately five days to cross the load from Mexico. According to the invoice and bill of lading attached to the complaint this load contained 10,262 pounds of Jubilee watermelons, and such melons were not included in complainant's accounting. Respondent's answer denies the purchase of any melons from complainant, and in the context of what is admitted to have occurred between the parties we conclude that this denial of the purchase of the melons is an assertion of the consignment relationship existing between the parties Respondent's answer was sworn to and therefore is in evidence. Complainant submitted no rebuttal evidence, and we conclude that, even though the 10,262 pounds of Jubilee watermelons were not included in complainant's accountings, they were nevertheless received on consignment from respondent. The Jubilees were shipped to respondent at a price of $.16 per lb. on the 28th. However, on the 25th, the applicable market report shows a price of $.18 per lb.. The same price would be applicable to the 30,300 pounds of Green Peacock watermelons. The gross returns shown on complainant's accounting should therefore be $7,301.16. Expenses in the amount of $2,948.15 are shown on complainant's accounting. Pursuant to the agreement between the parties in regard to commission charges the $509.04 commission should be deducted leaving net expenses of $2,439.11. Complainant is due from respondent $7,301.16, and respondent is due from complainant the net proceeds of $4,862.05 which results in a net amount of $2,439.11 due complainant from respondent on this load.

The third load is covered by finding of fact 6. This load arrived at the border on April 26, and was not crossed until it was crossed by respondent's agent on May 2, 1984. The load was shipped on May 4 and 5. Considering the intervening weekend the load should have been shipped by April 30, 1984. We conclude that complainant breached its contract with respondent in regard to this load. Complainant's accounting shows that 39,900 pounds were shipped to respondent at $.12

per lb. and 6,247 pounds were shipped to other parties at $.08 per lb.. The melons were Green Peacocks and would fall under the Jubilee category in the market reports. No size is given in complainant's accounting for the melons shipped to respondent but all sizes of Jubilees were quoted at $.16 per lb., or a total for the 39,900 pounds of $6,384.00. The 6,247 lbs. of melons shipped to other parties should also be assigned a per lb. price of $.16 or a total price of $999.52. Total expenses shown on complainant's accounting, exclusive of commission, amount to $3,013.90. Pursuant to the agreement between the parties the 12 percent commission should be charged only for product shipped to other parties. Such commission amounts to $119.42, and added to the expenses above results in total expenses of $3,133.32. Complainant is due from respondent on this load $7,383.52. Respondent is due from complainant the total net proceeds ($6,384.00 + $999.52 – $3,133.32) of $4,250.20 which results in a net amount due complainant of $2,133.80.

The fourth load is covered by finding of fact 7. This load arrived at the border on April 26, and was not crossed until it was crossed by respondent's agent on May 2, 1984. The load was shipped on May 4 and 5. Considering the intervening weekend the load should have been shipped by April 30, 1984. We conclude that complainant breached its contract with respondent in regard to this load. Complainant's accounting shows that 48,400 pounds were shipped to respondent at $.12 per lb. and 4,310 pounds were shipped to other parties at $.08 per lb.. The melons were Green Peacocks and would fall under the Jubilee category in the market reports. No size is given in complainant's accounting for the melons shipped to respondent but all sizes of Jubilees were quoted at $.16 per lb., or a total for the 48,400 pounds of $7,744. The 4,310 pounds shipped to other parties should also be assigned a per lb. price of $.16, or a total price of $689.60. Total expenses, exclusive of commissions, are shown on complainant's accounting as $3,438.82. Pursuant to the agreement between the parties the 12 percent commission should be allowed only for product shipped to other parties. Such commission amounts to $82.75, and added to the expenses above results in total expenses of $3,521.57. Complainant is due from respondent on this load $7,744. Respondent is due from complainant the total net proceeds ($7,744 + $689.60 – $3,521.57) of $4,912.03 which results in a net amount due complainant of $2,831.97.

The fifth load is covered by finding of fact 8. This load arrived at the border on April 27, and was not crossed until it was crossed by respondent's agent on May 2, 1984. The load was shipped on May 4 and 5. Considering the intervening weekend the load should have been shipped by May 1, 1984. We conclude that complainant breached its

contract with respondent in regard to this load. Complainant's accounting shows 45,836 pounds were shipped to respondent at $.12 per lb., and 3,520 pounds to other parties at $.08 per lb.. The melons were Green Peacock and would fall under the Jubilee category in the market reports. No size is given in complainant's accounting for the melons shipped to respondent, therefore, we will use the average price shown by the May 1, market report for Jubilees, or $.15 per lb., which results in a total for the 45,836 pounds of $6,875.40. The 3,520 pounds shipped to other parties were size 6 and therefore, should be assigned a price of $.14 per lb., or a total price of $492.80. Total expenses exclusive of commission, are shown on complainant's accounting as $3,149.98. Pursuant to the agreement between the parties the 12 percent commission should be allowed only for product shipped to other parties. Such commission amounts to $59.14, and added to the expenses above results in total expenses of $3,209.12. Complainant is due from respondent on this load $6,875.40. Respondent is due from complainant the total net proceeds ($6,875.40 + $492.80 - $3,209.12) of $4,159.08, which results in a net amount due complainant of $2,716.32.

The sixth load is covered by finding of fact 9. The load arrived at the border on April 27, and was not imported until it was crossed by respondent's agent on May 2, 1984. The load was shipped May 3 through 6. Considering the intervening weekend the load should have been shipped by May 1, 1984. We conclude that complainant's failure to ship the load by that date was a breach of its contract with respondent. Complainant's accounting shows 24,864 lbs. with no size specified were shipped to respondent at $.12 per lb.. 1,255 pounds of size 4 at $.1375 per lb., 1,596 pounds of size 4 at $.135 per lb., and 2,345 pounds of size 6 at $.08 per lb. were shipped to other parties. The melons were Green Peacocks and would fall under the Jubilee category in the market reports. The average price for all sizes of Jubilees on May 1, 1984, was $.15 which results in a total of $3,729.60 for the 24,864 pounds. The 2,851 pounds of size 4 melons shipped to other parties would have a value, at $.16 per lb., of $456.16. The 2,345 pounds of size 6 melons would have a value, at $.14 per lb., of $328.30. Total expenses, exclusive of commission, are shown on complainant's accounting as $2,056.54. Pursuant to the agreement between the parties the 12 percent commission should be allowed only for product shipped to other parties. Such commission amounts to $94.14, and added to the expenses above results in total expenses of $2,150.68. Complainant is due from respondent on this load $3,729.60. Respondent is due from complainant the total net proceeds ($3,729.60 + $456.18 + 328.30 - $2,150.68) of $2,363.40, which results in a net amount due complainant of $1,366.20

The seventh load is covered by finding of fact 10. The load arrived at the border on April 27, and was crossed by complainant on the same day. However the load was not shipped until May 3 through 8, 1984. Considering the intervening weekend the load should have been shipped by May 1, 1984. Even though this load was crossed promptly by complainant it should have also been shipped promptly, and we conclude that complainant's failure to ship this load by May 1, 1984, was a breach of the contract between the parties. Complainant's accounting shows that on May 3, 20,000 pounds of Green Peacocks with no size specified were shipped to respondent at $.12 per lb., and that on May 3, and 6, 1,139 lbs. of size 3 Grays at $.1375 per lb., and on May 8, 7,663 pounds of size 4 Jubilees at $.16 per lb. were shipped to other parties. The May 1, average price shown by the market reports which would apply to the 20,000 pounds of Peacock melons would be $.15. These melons would have a value of $3,000. The 7,663 pounds of size 4 Jubilees shipped to another party would have a value of $1,226.08. The Gray melons were size 3's and according to the market report would have a value of $.14 or $159.46. Total expenses, exclusive of commission, are shown on complainant's accounting as $2,083.53. Pursuant to the agreement between the parties the 12 percent commission should be allowed only for product shipped to other parties. Such commission amounted to $166.26, and added to the expenses above results in total expenses of $2,251.79. Complainant is due from respondent on this load $3,000. Respondent is due from complainant the total net proceeds ($3,000 + $1,226.08 + $159.46 - $2,251.79) or $2,133.75, which results in a net amount due complainant of $866.25.

The eighth load is covered by finding of fact 11. The load arrived at the border on April 28, and was crossed by complainant at an unknown time. The load was not shipped until May 3, through 7. Considering the intervening weekend the load should have been shipped by May 2, 1984. Even though this load may have been crossed promptly by complainant, it should have also been shipped promptly, and we conclude that complainant's failure to ship this load by May 2, 1984, was a breach of the contract between the parties. Complainant's accounting shows poundages and sizes of Greys and Jubilees were shipped on the dates set forth below at the indicated prices. The applicable prices shown by the May 2, market report are shown in the extreme right column:

May 3	Jubilee 4's	1,035 lbs. at $.15.	16
May 3	Gray 4's	13,904 lbs. at $.1375	.14
May 4	Jubilee 3's	1,723 lbs. at $.1475	.16
May 6	Gray 3's	3,428 lbs. at $.1375	.14
May 6	Grays 4's	383 lbs. at $.1350	.14

May 6	Jubilee 3's	10,982 lbs. at $.16	.16
May 6	Gray 3's	2,121 lbs. at $.16	.14
May 7	Jubilee 3's	8,094 lbs. at $.1350	.16
May 5	#2 3's	1,189 lbs. at $.10	.14
May 5	#2 4's	10,546 lbs. at $.10	.14

Complainant's accounting does not show what variety the #2 melons were, and we have assigned them the lowest price shown by the market report for the applicable size melons. We also will utilize the actual higher sale price for the 2,121 pounds of Gray 3's shipped on May 6, rather than the lower price shown by the May 2, market report. Since all of this load was sold to parties other than respondent, complainant is due nothing from respondent as to this load. The gross proceeds on this load should have totaled $7,955.80. Expenses, exclusive of commission, shown by complainant's accounting were $4,446.51. Adding the applicable 12 percent commission of $954.70 results in total expenses of 5,401.21. Net proceeds due respondent from complainant as to this load are $2,554.59.

The last two loads are covered by findings of fact 12 and 13. Respondent states in his counterclaim that "[t]he last two loads were also ordered to stand-by like all others, that had green peacock watermelons." In addition respondent later states "[t]hat complainant's negligence in not performing his agreed duties and responsibilities, caused the loss of two loads of watermelons, which had to be dumped or reconditioned because of spoilage condition the product was in." It is not at all clear whether this last statement is meant to refer to the last two loads or to two of the loads which were received by respondent in San Jose. Respondent made a statement during the informal stages of this proceeding which clearly does refer to these last two loads: "There were two (2) loads of watermelon that had crossed and were returned back to Mexico, because of bad condition. Wolverine does not show credit for charges by customs." It clear from respondent's submissions during the informal stages of these proceedings that he classifies the non freight payments to Robert F. Barnes together with the payments to Jaime Cantu de Luna as charges for customs. Complainant made no reply to any of this. Although the evidence is very meager we must nevertheless decide the parties' relative responsibilities as to these two loads. We conclude that since the two loads arrived at the border on May 2, after respondent became aware of complainant's delays in crossing the melons, any delay in crossing that may have occurred (respondent does not state what the delay, if any, was) was equally the responsibility of respondent. Neither party states what happened to the melons after they were sent back into Mexico. We conclude that the melons, after being sent back into Mexico, were under respondent's care and were respondent's responsibility. We also conclude that re

spondent is not entitled to any damages from complainant as to these two loads. However, respondent alleged that since the melons were crossed back into Mexico, he should have been given credit for the customs charges, and respondent has made it sufficiently clear what he considers those customs charges to have been. Since complainant made no reply to these claims we concur with respondent. We conclude that, as to the last two loads, respondent is liable to complainant, only for the amounts of the freight, or a total of $3,121.31.

We have found a total amount owing from respondent to complainant on loads 2 through 7, and on loads 9 to 10, of $15,474.96. In addition respondent is liable to complainant for the watermelons shipped May 9, through 17, 1984, as set forth in finding of fact 14, in the total amount of $1,869.29. Against these two amounts should be set off the total amount which we have found owing from complainant to respondent on loads 1 and 8, or $4,994.11, which leaves a balance due and owing from respondent to complainant of $12,350.14. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant from respondent.

The counterclaim should be dismissed.

Order

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $12,350.14, with interest thereon at the rate of 13 percent per annum from June 1, 1984, until paid.

The counterclaim is dismissed.

Copies of this order shall be served upon the parties.

REPARATION DEFAULT ORDERS ISSUED BY DONALD A. CAMPBELL, JUDICIAL OFFICER
(Summarized)

AARESTED FARM PRODUCTS, INC. v. J.A. HOWELL, d/b/a J. A. HOWELL PRODUCE

PACA Docket No. RD-87-218.

Default order issued April 22, 1987.

Respondent was ordered to pay complainant, as reparation, $3,025.75 plus 13 percent interest per annum thereon from May 1, 1986, until paid.

ADAMS BROS. PRODUCE CO., INC. v. H & L SALES, INC.

APPLE SALES INC. v. BIG APPLE WHOLESALE PRODUCE CO., INC.

PACA Docket No. RD-87-204.

Default order issued April 16, 1987.

Respondent was ordered to pay complainant, as reparation, $3,949.20 plus 13 percent interest per annum thereon from June 1, 1986, until paid.

APPLELAND FRUIT SALES INC. v. TWIG OF MIAMI INC. a/t/a BEST PRODUCE

PACA Docket No. RD-87-186.

Default order issued April 6, 1987.

Respondent was ordered to pay complainant, as reparation, $5,265.50 plus 13 percent interest per annum thereon from August 1, 1986, until paid.

ARKANSAS VALLEY PRODUCE OF TEXAS INC. v. McALLEN PRODUCE CO. INC.

PACA Docket No. RD-87-194.

Default order issued April 8, 1987.

Respondent was ordered to pay complainant, as reparation, $5,692. 50 plus 13 percent interest per annum thereon from July 1, 1986, until paid.

CHARLES E. BECK v. THOMAS A. RUDY

PACA Docket No. RD-87-202.

Default order issued April 8, 1987.

Respondent was ordered to pay complainant, as reparation, $11,226.80 plus 13 percent interest per annum thereon from July 1, 1985, until paid.

JAMES L. BRANCH d/b/a J.L. BRANCH PACKING CO. v. JOE PINTO & SON INC.

PACA Docket No. RD-87-203.

Default order issued April 16, 1987.

Respondent was ordered to pay complainant, as reparation, $16,503.72 plus 13 percent interest per annum thereon from January 1, 1986, until paid.

C & C ENTERPRISES INC v. GOLDEN HARVEST PRODUCE DIST. INC.

PACA Docket No. RD-87-201.

Default order issued April 8, 1987.

Respondent was ordered to pay complainant, as reparation, $44,611.00 plus 13 percent interest per annum thereon from June 1, 1986, until paid.

CALAVO GROWERS OF CALIFORNIA v
d/b/a VINCENT MAENZA BANANA CC

PACA Docket No. RD-87-200.

Default order issued April 8, 1987.

Respondent was ordered to pa
$10,845.50 plus 13 percent interest p
1986, until paid.

CURTIS W. CARGIL d/b/a CARC
VINCENT D. MAENZA d/b/a VIN
a/t/a MAENZA & SONS

PACA Docket No. RD-87-176.

Default order issued April 1, 1987.

Respondent was ordered to p
$4,913.75 plus 13 percent interest
1986, until paid.

CURTIS W. CARGIL d/b/a CARGIL PRODUCE COMPANY v. TWIG OF MIAMI INC. a/t/a BEST PRODUCE

PACA Docket No. RD-87-189.

Default order issued April 6, 1987.

Respondent was ordered to pay complainant, as reparation, $10,983.35 plus 13 percent interest per annum thereon from August 1, 1986, until paid.

DELAWARE PRODUCE GROWERS INC. v. TWIG OF MIAMI INC. a/t/a BEST PRODUCE

PACA Docket No. RD-87-187.

Default order issued April 6, 1987.

Respondent was ordered to pay complainant, as reparation, $1,915.00 plus 13 percent interest per annum thereon from September 1, 1986, until paid.

DEW-GRO INC a/t/a CENTRAL WEST PRODUCE v. TWIG OF MIAMI INC. a/t/a BEST PRODUCE

PACA Docket No. RD-87-185.

Default order issued April 6, 1987.

Respondent was ordered to pay complainant, as reparation, $542.20 plus 13 percent interest per annum thereon from July 1, 1986, until paid.

EBIA/PROXORA DISTRIBUTING INC. v. FLAMINGO PRODUCE SALES INC.

PACA Docket No. RD-87-178.

Default order issued April 3, 1987.

Respondent was ordered to pay complainant, as reparation, $12,928.86 plus 13 percent interest per annum thereon from March 1, 1986, until paid.

EBIA/PROXORA DISTRIBUTING INC. v. JOE PINTO & SON INC.

PACA Docket No. RD-87-208.

Default Order issued April 16, 1987.

Respondent was ordered to pay complainant, as reparation, $2,788.08 plus 13 percent interest per annum thereon from February 1, 1986, until paid.

FRESH WESTERN MARKETING INC. v. TWIG OF MIAMI INC. a/t/a BEST PRODUCE.

PACA Docket No. RD-87-188.

Default order issued April 6, 1987.

Respondent was ordered to pay complainant, as reparation, $13,119.95 plus 13 percent interest per annum thereon from August 1, 1986, until paid.

G. A. FUNDERBURK CO., INC. v. DARCO PRODUCE, INC.

PACA Docket No. RD-87-23.

Order issued April 2, 1987.

pay. At that point, the January 21, 1987, order was informally stayed until the issuance of an amended order.

After examining the record, it is clear that the transactions which complainant had alleged were unpaid all accrued within the nine month period prior to the filing of the complaint, and therefore are within the Secretary's jurisdiction. The January 21, 1987, order is thus amended to reflect that respondent has failed to pay $48,524.49, as alleged in the complaint, which is a violation of section 2 of the Act. Within 30 days from the date of this order, respondent shall pay complainant, as reparation, $48,524.49, with interest thereon at the rate of 13 percent per annum, from August 1, 1985, until paid.

Copies of this order shall be served upon the parties.

G & H SALES INC. v. THE OK POTATO CHIP COMPANY INC.

PACA Docket No. RD-87-193.

Default order issued April 8, 1987.

Respondent was ordered to pay complainant, as reparation, $5,038.49 plus 13 percent interest per annum thereon from April 1, 1986, until paid.

JOE GENOVA & ASSOCIATES INC. v. BOISE FARMERS MARKET INC.

PACA Docket No. RD-87-221.

Default order issued April 22, 1987.

Respondent was ordered to pay complainant, as reparation, $43,980.02 plus 13 percent interest per annum thereon from April 1, 1986, until paid.

ROGER HARLOFF PACKING INC. v. McALLEN PRODUCE CO. INC.

PACA Docket No. RD-87-195.

Default order issued April 8, 1987.

Respondent was ordered to pay complainant, as reparation, $19,040.00 plus 13 percent interest per annum thereon from July 1, 1986, until paid.

HENRY AVOCADO PACKING CORPORATION v. McALLEN PRODUCE CO. INC.

PACA Docket No. RD-87-196.

Default order issued April 8, 1987.

Respondent was ordered to pay complainant, as reparation, $18,721.80 plus 13 percent interest per annum thereon from June 1, 1986, until paid.

C. M. HOLTZINGER FRUIT CO. INC. v. TWIG OF MIAMI INC. a/t/a BEST PRODUCE.

PACA Docket No. RD-87-184.

Default order issued April 6, 1987.

Respondent was ordered to pay complainant, as reparation, $7,064.00 plus 13 percent interest per annum thereon from July 1, 1986, until paid.

HENRY T. JACOBS v. KOSTER ENTERPRISES PRODUCE PACKING DIVISION, INC.

PACA Docket No. 2-6531.

Default order issued April 2, 1987.

Respondent was ordered to pay complainant, as reparation, $705.00 plus 13 percent interest per annum thereon from January 1, 1983, until paid.

J. R. SALES INC. v. JOSEPH C. CIRAME d/b/a FRONTIER WATERMELON.

PACA Docket No. RD-87-182.

Default order issued April 3, 1987.

Respondent was ordered to pay complainant, as reparation, $18,109.24 plus 13 percent interest per annum thereon from June 1, 1986, until paid.

MANNY LAWRENCE SALES CO. INC. v. RICHARD ITULE PRODUCE INC.

PACA Docket No. RD-87-183.

Default order issued April 6, 1987.

Respondent was ordered to pay complainant, as reparation, $60,579.10 plus 13 percent interest per annum thereon from June 1, 1986, until paid.

MANNY LAWRENCE SALES CO. INC. a/t/a GILT EDGED PRODUCE SALES v. RICHARD ITULE PRODUCE INC.

PACA Docket No. RD-87-220.

Default order issued April 22, 1987.

Respondent was ordered to pay complainant, as reparation, $2,803.50 plus 13 percent interest per annum thereon from June 1, 1986, until paid.

LEVY & CO. INC. v. JOSEPH PINTO SR. d/b/a EAST COAST PRODUCE.

PACA Docket No. RD-87-197.

Default order issued April 8, 1987.

Respondent was ordered to pay complainant, as reparation, $4,860.00 plus 13 percent interest per annum thereon from June 1, 1986, until paid.

LINDEMANN FARMS INC. v. TWIG OF MIAMI INC. a/t/a BEST PRODUCE.

PACA Docket No. RD-87-191.

Default order issued April 6, 1987.

Respondent was ordered to pay complainant, as reparation, $2,155.80 plus 13 percent interest per annum thereon from September 1, 1986, until paid.

JOHN LIVACICH PRODUCE INC. a/t/a VISTA AVOCADO v. McALLEN PRODUCE CO. INC.

PACA Docket No. RD-87-223.

Default order issued April 22, 1987.

Respondent was ordered to pay complainant, as reparation, $3,588.00 plus 13 percent interest per annum thereon from July 1, 1986, until paid.

GERALD LOWRIE d/b/a L & L PACKING COMPANY OF CALIF. v. JOE PINTO & SON INC.

PACA Docket No. RD-87-207.

Default order issued April 16, 1987.

Respondent was ordered to pay complainant, as reparation, $6,650.70 plus 13 percent interest per annum thereon from March 1, 1986, until paid.

F. G. (JERRY) McDONALD PRODUCE CO. v. STEVE C. CONTI and ROBERT L. DUSCHL d/b/a TOTAL TOMATO.

PACA Docket No. RD-87-216.

Default order issued April 22, 1987.

Respondent was ordered to pay complainant, as reparation, $1,641.60 plus 13 percent interest per annum thereon from December 1, 1985, until paid.

MEREX CORP. v. UNITED FRUIT AND PRODUCE INC.

PACA Docket No. RD-87-174.

Default order issued April 1, 1987.

Respondent was ordered to pay complainant, as reparation, $3,882.50 plus 13 percent interest per annum thereon from May 1, 1986, until paid.

FRANK MINARDO INC. v. VALLEY BROKERAGE INC.

PACA Docket No. RD-87-198.

Default order issued April 8, 1987.

Respondent was ordered to pay complainant, as reparation, $170.00 plus 13 percent interest per annum thereon from February 1, 1986, until paid.

MURAKAMI FARMS INC. a/t/a MURAKAMI PRODUCE CO. v. JOSEPH J. STELLY d/b/a STELLY PRODUCE.

PACA Docket No. RD-87-199.

Default order issued April 8, 1987.

Respondent was ordered to pay complainant, as reparation, $6,523.75 plus 13 percent interest per annum thereon from January 1, 1986, until paid.

NAJDEK PRODUCE CO. v. HAWK PRODUCE INC.

PACA Docket No. RD-87-214.

Default order issued April 20, 1987.

Respondent was ordered to pay complainant, as reparation, $20,459.52 plus 13 percent interest per annum thereon from December 1, 1985, until paid.

KENT W. NORTHCROSS d/b/a NORTHCROSS DISTRIBUTING v. DAVE WESTENDORF PRODUCE SALES INC.

PACA Docket No. RD-87-175.

Default order issued April 1, 1987.

Respondent was ordered to pay complainant, as reparation, $2,438.90 plus 13 percent interest per annum thereon from March 1, 1986, until paid.

NORTHERN FRUIT CO. INC. v. TWIG OF MIAMI INC. a/t/a BEST PRODUCE.

PACA Docket No. RD-87-190.

Default order issued April 6, 1987.

Respondent was ordered to pay complainant, as reparation, $23,468.70 plus 13 percent interest per annum thereon from August 1, 1986, until paid.

THE NUNES COMPANY INC. v. BREVARD PRODUCE DIST. INC.

PACA Docket No. RD-87-213.

Default order issued April 20, 1987.

Respondent was ordered to pay c
plus 13 percent interest per annum
until paid.

PACA Docket No. RD-87-192.

Default order issued April 6, 1987.

Respondent was ordered to pay complainant, as reparation, $1,953.00 plus 13 percent interest per annum thereon from September 1, 1986, until paid.

H. JENNINGS ROU, INC. v. A. V. CANCELMO, III d/b/a A. CANCELMO CO.

PACA Docket No RD-87-179.

Default order issued April 3, 1987

Respondent was ordered to pay complainant, as reparation, $15,537.96 plus 13 percent interest per annum thereon from January 1, 1986, until paid

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SEVERT & SONS PRODUCE v. BOISE FARMERS MARKET INC.

PACA Docket No. RD-87-222.

Default order issued April 22, 1987.

Respondent was ordered to pay complainant, as reparation, $3,946.00 plus 13 percent interest per annum thereon from January 1, 1986, until paid.

SUNSPROUTS OF TEXAS INC. v. FRANK S. MEDRANO d/b/a FRANK'S PRODUCE.

PACA Docket No. RD-87-173.

Default order issued April 1, 1987.

Respondent was ordered to pay complainant, as reparation, $16,145.50 plus 13 percent interest per annum thereon from January 1, 1986, until paid.

SUNSPROUTS OF TEXAS, INC. v. BROTHERS WHOLESALE PRODUCE, INC.

PACA Docket No. RD-87-149.

Order filed April 27, 1987.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $1,715.50 in connection with a transaction involving the shipment of produce in interstate commerce.

A copy of the formal complaint was served on respondent. Complainant, in its letter of March 31, 1987, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

TOMATOES INC. v. RALPH & CONO COMUNALE PRODUCE CORP.

PACA Docket No. RD-87-209.

Default order issued April 20, 1987.

Respondent was ordered to pay complainant, as reparation, $652.00 plus 13 percent interest per annum thereon from December 1, 1985, until paid.

DALE ALLEN TORBERT d/b/a TORBERT FARMS v. DAVIS DISTRIBUTORS, INC.

PACA Docket No. RD-87-98.

Order issued April 27, 1987.

ORDER VACATING DEFAULT ORDER AND DISMISSING COMPLAINT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $2,543.00 in connection with a transaction involving the shipment of produce in interstate commerce.

A copy of the formal complaint was served on respondent. Respondent did not file an answer and, on February 5, 1987, a default order was issued, awarding reparation to complainant in the amount of $2,543.00. By letter received February 26, 1987, respondent moved

to reopen after default. Respondent indicated that it had fully paid complainant before the issuance of the default order. A review of the file disclosed that on February 5, 1987, the Department had received a letter from complainant dated January 30, 1987, in which he indicated that prior to the issuance of the default order, respondent had tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of January 30, 1987, authorized dismissal of its complaint filed herein.

Accordingly, there was no violation of the Act when the default order was issued, and it is hereby vacated. In addition, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

TREASURE VALLEY GROWERS & SALES INC. v. HOUSTON FRUITLAND INC.

PACA Docket No. RD-87-181.

Default order issued April 3, 1987.

Respondent was ordered to pay complainant, as reparation, $2,738.00 plus 13 percent interest per annum thereon from January 1, 1986, until paid.

TRICAR SALES INC. v. MCALLEN PRODUCE CO. INC.

PACA Docket No. RD-87-224.

Default order issued April 22, 1987.

Respondent was ordered to pay complainant, as reparation, $6,210.70 plus 13 percent interest per annum thereon from May 1, 1986, until paid.

VALLEY BROKERAGE INC. v. RALPH M. JARSON d/b/a RALPH JARSON.

PACA Docket No. RD-87-211.

Default order issued April 20, 1987.

Respondent was ordered to pay complainant, as reparation, $23,134.48 plus 13 percent interest per annum thereon from August 1, 1985, until paid.

WILSON MUSHROOM CO. INC. v. M. LAUCELLA INC.

PACA Docket No. RD-87-205.

Default order issued April 16, 1987.

Respondent was ordered to pay complainant, as reparation, $16,964.45 plus 13 percent interest per annum thereon from February 1, 1986, until paid.

PLANT QUARANTINE ACT

LIST OF DECISIONS REPORTED

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*U.S. GOVERNMENT PRINTING OFFICE: 1989-617-013/81149

PLANT QUARANTINE ACT

In re: KATHLEEN D. WARNER.

P.Q. Docket No. 271.

Ruling filed April 1, 1987.

Luggage not submitted for agricultural inspection—Civil penalty.

The Judicial Officer ruled on a question certified by Administrative Law Judge Weber that complainant's motion for summary decision on the pleading should be granted because respondent's answer does not deny the allegations of the complaint, but merely explains that any violation occurred because of a language or communication misunderstanding between herself and the Oriental Inspector. In order to prevent the importation into the United States of items that could be disastrous to the agricultural community, violators must be held responsible for any violation irrespective of lack of evil motive or intent to violate the quarantine laws

Clement McGovern, for complainant.

Respondent, pro se.

Question Certified by William J. Weber, Administrative Law Judge.

Ruling by Donald A. Campbell, Judicial Officer.

RULING ON CERTIFIED QUESTION

On March 20, 1987, Administrative Law Judge William J. Weber certified to the Judicial Officer the question as to whether complainant's motion for summary decision on the pleadings should be granted. Respondent's answer does not deny the allegations of the complaint, but explains that any violation occurred because of a language/communication misunderstanding between herself and the Oriental inspector.

I am quite sure that respondent's answer truthfully states the facts, i.e., that she did not intentionally try to avoid an agricultural inspection of her luggage. Nonetheless, she does not deny that, through a language misunderstanding or failure of communication between herself and the Oriental inspector, her luggage was not submitted for inspection.

As previously explained, "in order to achieve the congressional purpose and to prevent the importation into the United States of items that could be disastrous to the United States agricultural community, it is necessary to take a hard-nosed approach and hold violators responsible for any violation irrespective of lack of evil motive or intent to violate the quarantine laws." *In re Capistrano*, 45 Agric. Dec. ____ (Sept. 9, 1986). *Accord In re Vallalta*, 45 Agric. Dec. ____ (June 17, 1986). However, since the violation was inadvertent and unintentional, only the minimum civil penalty of $250 should be assessed. *In re Lopez*, 44 Agric. Dec. ____ (Oct. 7, 1985), attached as an appendix.

APPENDIX

In re Lopez, 44 Agric. Dec.____ (Oct. 7, 1985).